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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON

CONTAINING

DECISIONS RENDERED FROM APRIL 22 TO AUGUST 30,
1901, INCLUSIVE.

EUGENE G. KREIDER
REPORTER.

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TABLE OF CASES REPORTED

	<i>Page</i>
Aberdeen, Wilson v.....	614
Anderson v. Provident Life & Trust Co.....	20
Atkinson, State <i>ex rel.</i> Barr v.....	283
Baker, Latimer v.....	192
Ballard, Laurie v.....	127
Baltimore & S. M. & R. Co., Myrberg v.....	364
Bartelt v. Seehorn.....	261
Berlin v. Van De Vanter.....	465
Bingham v. Keylor.....	156
Bonney & Stewart, Littell v.....	430
Bowers v. Ledgerwood.....	14
Boyce, <i>In re</i>	612
Boyce, State v.....	422
Boyd v. Thuringia Ins. Co.....	447
Breen, Williams v.....	666
Bridges, Tacoma v.....	221
Briggs, Packwood v.....	530
Brown, Riddell v.....	514
Burkman v. Jamieson.....	606
Catlin, Griffin v.....	474
Chehalis County, North Western Lumber Co. v.....	95
Chehalis County, North Western Lumber Co. v.....	672
Cherry Point Fish Co. v. Nelson.....	558
Clarke v. Clyde.....	661
Clarkson, Murphy v.....	585
Clyde, Clarke v.....	661
Coey v. Darknell.....	518
Concannon, State v.....	327
Coulter, <i>In re</i>	526
Dalgardno v. Trumbull.....	362
Dalles, Portland & Astoria Navigation Co., Vogel v.....	672
Darknell, Coey v.....	518
Dolan v. Scott.....	214
Dunlap, State v.....	292
Dyer v. Middle Kittitas Irrigation District.....	80
Ely, Northern Pacific Ry. Co. v.....	384
Engstrom v. Merriam.....	73
Farmers' Supply Co., Groveland Imp. Co. v.....	344
Ferguson v. Hoshi	664

	<i>Page</i>
Fischer v. Woodruff.....	67
Flint v. Horsley.....	648
Flynn v. Furth.....	105
Ford, London & San Francisco Bank v.....	673
Frost, Seymour v.....	644
Frost, State v.....	134
Furth, Flynn v.....	105
Furth v. Kraft	590
Gardner, Krutz v.....	396
Genss, McGinnis v.....	490
German Savings & Loan Society, Kalb v.....	349
Golden Tunnel Mining Co., Ingram v.....	318
Gordon & Company, Tilden v.....	593
Gottstein v. Harrington.....	508
Griffin v. Catlin.....	474
Griffith v. Maxwell.....	658
Groveland Imp. Co. v. Farmers' Supply Co.....	344
Gunderson v. Gunderson.....	459
Hamilton v. Turpin.....	539
Harras, State v.....	416
Harrington, Gottstein v.....	508
Horsley, Flint v.....	648
Hoshi, Ferguson v.....	664
Howard, Ross v.....	1
Howley v. Maddocks.....	297
Ingram v. Golden Tunnel Mining Co.....	318
<i>In re</i> Boyce.....	612
<i>In re</i> Coulter.....	526
<i>In re</i> Smith's Estate	539
<i>In re</i> Sullivan's Estate.....	430
Isaacs, Krutz v	566
Jamieson, Burkman v.....	606
Jennings v. McCormick.....	427
Kalb v. German Savings & Loan Society.....	349
Kelleher, Van Dusen v.....	315
Kennan, State <i>ex rel.</i> Belt v.....	621
Keylor, Bingham v.....	156
Koontz v. Koontz.....	336
Kraft, Furth v	590
Krutz v. Gardner	396
Krutz v. Isaacs.....	566

CASES REPORTED

1x

	<i>Page</i>
Lamping, State <i>ex rel.</i> Hastie v.....	278
Latimer v. Baker.....	192
Laurie v. Ballard	127
Lawyer, Sivyver v.....	360
Ledgerwood, Bowers v.....	14
Lincoln County, Selde v.....	198
Littell v. Bonney & Stewart.....	430
London & San Francisco Bank v. Ford.....	673
Lyts, State v.....	347
McCormick, Jennings v.....	427
MacDonald, State <i>ex rel.</i> Henry v.....	122
McDonald v. Svenson.....	441
McGinnis v. Genss.....	490
Maddocks, Howley v.....	297
Mathews, Scott v.....	486
Maxwell, Griffith v.....	658
Merriam, Engstrom v.....	73
Middle Kittitas Irrigation District, Dyer v	80
Morrison v. Morrison.....	466
Muhlenberg v. Tacoma.....	36
Murphy v. Clarkson.....	585
Myrberg v. Baltimore & S. M. & R. Co.....	364
Neal, State <i>ex rel.</i> Smith v.....	264
Nelson, Cherry Point Fish Co. v.....	558
Nelson v. Seattle Traction Company.....	602
Nixon v. Travellers' Ins. Co.....	254
Northern Pacific Ry. Co. v. Ely.....	384
North Western Lumber Co. v. Chehalis County.....	95
North Western Lumber Co. v. Chehalis County.....	672
Oates v. Shuey.....	597
Oceanic Packing Co., Wallace v.....	143
Owens v. Swanton	112
Packwood v. Briggs.....	530
Page v. Pierce County.....	6
Parker, State v.....	405
Parker v. Superior Court of Snohomish County.....	544
Parsons v. Tacoma Smelting & Refining Co.....	492
Pierce County, Page v.....	6
Pierce County, Rose v.....	119
Pierce County, Templeton v.....	377
Potter v. Whatcom.....	207
Provident Life & Trust Co., Anderson v.....	20

	<i>Page</i>
Riddell v. Brown	514
Rose v. Pierce County.....	119
Ross v. Howard.....	1
Saunders v. United States Marble Co.....	475
Scott, Dolan v.....	214
Scott v. Mathews.....	486
Seattle National Bank, Strohl v.....	28
Seattle, Smith v.....	300
Seattle, Times Printing Co. v.....	149
Seattle Traction Co., Nelson v.....	602
Seehorn, Bartelt v.....	261
Selde v. Lincoln County.....	198
Seymour v. Frost.....	644
Shuey, Oates v.....	597
Sivyer v. Lawyer.....	360
Skagit County v. Trowbridge.....	140
Skilbrick, State v.....	555
Smith v. Seattle.....	300
Smith's Estate, <i>In re</i>	539
Spokane & Idaho Lumber Co. v. Stanley.....	653
Spokane Street Railway Co., Traver v	225
Spokane, Ziegler v.....	439
Spratt, Whitney v.....	62
Stanley, Spokane & Idaho Lumber Co. v.....	653
State v. Boyce.....	422
State v. Concannon.....	327
State v. Dunlap.....	292
State v. Frost.....	134
State v. Harras.....	416
State v. Lyts.....	347
State v. Parker.....	405
State v. Skilbrick.....	555
State <i>ex rel.</i> Barr v. Atkinson.....	283
State <i>ex rel.</i> Belt v. Kennan.....	621
State <i>ex rel.</i> Campbell v. Superior Court.....	271
State <i>ex rel.</i> Hastie v Lamping.....	278
State <i>ex rel.</i> Henry v. MacDonald.....	122
State <i>ex rel.</i> Smith v. Neal.....	264
State <i>ex rel.</i> Stratton v. Tallman.....	295
Strain v. Young.....	578
Strohl v. Seattle National Bank.....	28
Superior Court of Snohomish County, Parker v.....	544
Superior Court, State <i>ex rel.</i> Campbell v.....	271
Sullivan's State, <i>In re</i>	430

CASES REPORTED

xi

	<i>Page</i>
Svenson, McDonald v.....	441
Swanton, Owens v.....	112
Tacoma v. Bridges.....	221
Tacoma, Muhlenberg v.....	36
Tacoma Smelting & Refining Co., Parsons v.....	492
Tallman, State <i>ex rel.</i> Stratton v.....	295
Templeton v. Pierce County.....	377
Thuringia Ins. Co., Boyd v.....	447
Tilden v. Gordon & Company.....	593
Times Printing Co. v. Seattle.....	149
Travellers' Insurance Co., Nixon v.....	254
Traver v. Spokane Street Railway Co.....	225
Trowbridge, Skagit County v.....	140
Trumbull, Dalgardno v.....	362
Turpin, Hamilton v.....	539
United States Marble Co., Saunders v.....	475
Van De Vanter, Berlin v.....	465
Van Dusen v. Kelleher.....	315
Vaughon, Vermont Loan & Trust Co. v.....	219
Vermont Loan & Trust Co. v. Vaughon.....	219
Vogel v. Dalles, Portland & Astoria Navigation Co.....	672
Wallace v. Oceanic Packing Co.....	143
West Coast Improvement Co., West Coast Manufacturing & Investment Co. v.....	627
West Coast Manufacturing & Investment Co. v. West Coast Improvement Co.....	627
Whatcom, Potter v.....	207
Whitney v. Spratt.....	62
Williams v. Breen.....	666
Wilson v. Aberdeen.....	614
Woodruff, Fisher v.....	67
Young, Strain v.....	578
Ziegler v. Spokane	439

TABLE OF CASES CITED

	<i>Page.</i>
Ake v. Mason, 101 Pa. St. 17.....	639
Allen v. Drew, 44 Vt. 174.....	309
Allentown v. Henry, 73 Pa. St. 404.....	309
American Mortgage Co. v. Hopper, 56 Fed. 67.....	66
Anderson v. Critcher, 37 Am. Dec. 72.....	218
Anderson v. Stadlmann, 17 Wash. 433.....	5
Anderson v. Whatcom County, 15 Wash. 47.....	269
Andrews v. King County, 1 Wash. 56.....	378
Annie Wright Seminary v. Tacoma, 23 Wash. 109.....	213
Ardesco Oil Co. v. North American Oil & Min. Co., 66 Pa. St. 375...	502
Armory v. Delamirie, 1 Strange, 505.....	178
Arnold v. Suffolk Bank, 27 Barb. 424.....	111
Askew v. Odenheimer, 2 Fed. Cas. 81.....	172
Astiazaran v. Santa Rita Land & Mining Co., 148 U. S. 80.....	10
Atchison, Topeka & Santa Fe R. R. Co. v. Bayes, 42 Kan. 609.....	414
Attorney General v. Delaware & B. B. R. Co., 27 N. J. Eq. 1.....	392
Attorney General v. Delaware & B. B. R. Co., 27 N. J. Eq. 631....	393
Attorney General v. Johnson, 2 Wills, Ch. 102.....	392
Attorney General v. Sheffield Gas Consumers Co., 3 De Gex. M & G. 304.....	393
Austin v. Seattle, 2 Wash. 667.....	311
Avery v. Job, 25 Ore. 512.....	647
Baker v. King County, 17 Wash. 623.....	380
Baker v. Seattle, 2 Wash. 576.....	212, 313
Bamberger v. Gelser, 24 Ore. 203.....	71
Bank of Stockton v. Howland, 42 Cal. 129.....	121
Bard v. Kleeb, 1 Wash. 370.....	620
Bardsley v. Sternberg, 18 Wash. 612	54
Barlow v. Delaney, 40 Fed. 97.....	640
Barre v. Flemings, 29 W. Va. 314.....	639
Bartholomew v. Derby Rubber Co., 69 Conn. 521.....	501
Bassett v. Fairchild, 132 Cal. 637.....	498
Bayley v. McCoy, 8 Ore. 259.....	637
Bean v. Briggs, 4 Iowa, 464.....	464
Beech v. Canaan, 14 Vt. 485.....	512
Belles v. Miller, 10 Wash. 259.....	357
Bellingham Bay Improvement Co. v. New Whatcom, 20 Wash. 53, 231,	209
Benn v. Chehalis County, 11 Wash. 135.....	379
Benton v. Milwaukee, 50 Wis. 368.....	121
Berry v. Missouri Pacific Ry. Co., 124 Mo. 223.....	246
Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co., 16 Wash. 681.....	35
Bingham v. Keylor, 19 Wash. 555.....	184
Birmingham v. Cheetham, 19 Wash. 657.....	224
Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455.....	505
Blue v. McCabe, 5 Wash. 125.....	375
Bobbett v. South Eastern Ry. Co., L. R. 9 Q. B. Div. 424.....	395
Bond v. Wilson, 8 Kan. 228.....	576
Bonnors v. State, 35 S. W. 650.....	418
Botiller v. Dominguez, 130 U. S. 238.....	10
Bower v. Bower, 5 Wash. 225	472

	<i>Page</i>
Bozon v. Bolland, 4 Myl. & C. 354.....	511
Bradley v. Parkhurst, 20 Kan. 462.....	600
Bradley v. Snyder, 14 Ill. 264.....	399
Brannan v. Strauss, 75 Ill. 234.....	176
Brier v. Traders' National Bank of Spokane, 24 Wash. 695.....	535
Brimhall v. Van Campen, 8 Minn. 13.....	464
Brothers v. Hurdle, 10 Ired. 490.....	664
Brown v. Alabama Great Southern R. Co., 87 Ala. 370.....	275
Brown v. Bigley, 3 Tenn. Ch. 621.....	511
Buckham v. Grape, 65 Iowa, 535.....	611
Burdick v. Cameron, 42 N. Y. Supp. 78.....	217
Burt v. State, 48 Am. St. Rep. 563.....	421
Byers v. Commonwealth, 42 Pa. St. 89.....	626
Byrne v. Schuyler Electric Manufacturing Co., 65 Conn. 336.....	505
Caba v. United States, 152 U. S. 211.....	65
California Bank v. Kennedy, 167 U. S. 362.....	508
California Safe Deposit & Trust Co. v. Cheney Electric Light, etc., Co., 12 Wash. 138.....	599
Callan v. Wilson, 127 U. S. 540.....	623
Carrigan v. Port Crescent Imp. Co., 6 Wash. 590.....	483
Carrington v. St. Louis, 89 Mo. 208.....	132
Catterlin v. Armstrong, 79 Ind. 514.....	399
Caufield v. Clark, 17 Ore. 473.....	17
Cavallaro v. Texas & Pacific Ry. Co., 110 Cal. 348.....	463
Central Pacific R. R. Co. v. Nevada, 162 U. S. 512.....	9
Chappell v. Dann, 21 Barb. 17.....	512
Chehalls County v. Ellingson, 21 Wash. 638.....	657
Churchill v. Ackerman, 22 Wash. 227.....	668
City Five Cents Savings Bank v. Pennsylvania Fire Ins. Co., 122 Mass. 165	450
Clark v. Davoe, 124 N. Y., 120.....	635
Clarke v. Lyon County, 8 Nev. 181.....	121
Clayton v. Calhoun, 76 Ga. 270.....	274
Cleveland & St. Louis R. R. Co. v. Pattison, 15 Ind. 70.....	175
Coffee v. Greenfield, 55 Cal. 382.....	52
Cole v. Parker, 70 Mo. 372.....	19
Cole v. Union Central Life Ins. Co., 22 Wash. 26.....	259
Colegrave v. Manley, T. & R. 400.....	511
Collins v. King County. 1 Wash. T. 416.....	120
Collins v. People, 98 Ill. 584.....	335
Colorado Company v. Commissioners, 95 U. S. 259.....	10
Commissioners' Court of Lowndes County v. Hearne, 59 Ala. 371....	207
Commonwealth v. Costley, 118 Mass. 1.....	421
Commonwealth ex rel. Attorney General v. Bala & B. M. Turnpike Co., 153 Pa. St. 47.....	391
Conover v. Hull, 10 Wash. 673.....	35
Consolidated Traction Co. v. Reeves, 58 N. J. Law, 573.....	247
Continental Ins. Co. v. Hulman, 92 Ill. 145.....	450
Cook v. Blakely, 6 Kan. App. 707.....	67
Copeland v. Citizens' Gas Light Co., 61 Barb. 60.....	505
Copeland v. McAdory, 100 Ala. 553.....	637
Cornell v. Radway, 22 Wls. 260.....	27
Crawford v. McKinney, 165 Pa. St. 609.....	90
Crawford v. Taylor, 42 Iowa, 260.....	401
Cromwell v. County of Sac, 94 U. S. 351.....	217

CASES CITED

xv

	<i>Page</i>
Crosby v. Farmer, 39 Minn. 305.....	577
Curtin v. Salmon River, etc., Ditch Co., 130 Cal. 345.....	498
Dana v. Bank of the United States, 5 W & S. 223.....	503
Dane v. Daniel, 23 Wash. 379.....	70
Danziger v. Williams, 91 Pa. St. 234.....	217
Davis v. Fields, 9 Wash. 78.....	471
D. & C. Steam Towboat Co. v. Starrs, 69 Pa. St. 36.....	254
Decker v. Gardner, 124 N. Y. 334.....	110
Dennis v. Kass, 13 Wash. 137.....	424
Denny v. Cole, 22 Wash. 372.....	111
Denny Hotel Co. v. Schram, 6 Wash. 134.....	508
Dimmick v. Collins. 24 Wash. 78.....	520
Dobbins v. Higgins, 78 Ill. 440.....	89
Dotson v. Pearce, 62 Am. Dec. 158.....	577
Donahue v. Illinois, etc., R. R. Co., 165 Ill. 640.....	395
Drake v. Foster, 52 Cal. 225.....	121
Dubois v. Johnson, 96 Ind. 6.....	343
Dunbar v. United States, 156 U. S. 185.....	421
Dutcher v. Culver, 23 Minn. 415.....	205
Easterby vs. Hellbron, 1 McM. 462.....	635
East Tennessee Iron & Coal Co. v. Ferguson's Heirs, 35 S. W. 900....	17
Edison Electric Illuminating Co. v. Spokane County, 22 Wash 168....	381
Edwards v. State, 2 Wash. 291.....	334, 422
Elwood v. Western Union Telegraph Co., 45 N. Y., 549.....	523
Erle, etc., Ry. Co. v. Rousseau, 17 Ont. App. 483.....	395
Farquharson v. Yeargin, 24 Wash. 549.....	581
Faulknor v. Seattle, 19 Wash. 320.....	212
Feurer v. Stewart, 83 Fed. 793.....	638
Flacre v. Chapman, 32 N. J. Eq. 463.....	536
Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. 851..	51
Finley v. Houser, 22 Ore. 562.....	353
First National Bank v. National Exchange Bank, 92 U. S. 122.....	507
Fitzgerald v. School District, 5 Wash. 112.....	121
Fleming v. Bowe, 13 Land Dec. Dep. Int. 78.....	65
Flint & Pere Marquette Ry. Co. v. Dewey, 14 Mich. 477.....	149
Fogg v. Town of Hoquiam, 23 Wash. 340.....	212
Ford v. Jones, 22 Wash. 111.....	517
Forgey v. First Nat. Bank of Cambridge City, 66 Ind. 123.....	253
Franklin Bank v. Commercial Bank, 36 Ohio St. 350.....	508
Franklin National Bank v. Newcombe, 37 N. Y. Supp. 271.....	56
Fulkerson v. Stevens, 31 Kan. 125.....	206
Fuller v. Mayor, etc., of Jackson, 92 Mich. 197.....	129
Furrow v. Chapln, 13 Kan. 107.....	464
Gage v. Brewster, 31 N. Y., 218.....	399
Gallery v. National Exchange Bank, 41 Mich. 169.....	149
Gates v. Brown, 1 Wash. 470.....	475
German-American Savings Bank v. Spokane, 17 Wash. 315.....	210
Godwin v. Monds, 106 N. C. 448.....	577
Goodman v. Halles, 59 Ohio St. 342.....	611
Goodnow v. Litchfield, 63 Iowa, 275.....	537
Goodnow v. Moulton, 51 Iowa, 555.....	537
Gower v. Winchester, 33 Iowa, 303.....	400
Grady v. Gosline, 48 Ohio St. 665.....	577
Grand Rapids & Bay City R. R. Co. v. Van Deusen, 29 Mich. 443....	90

	<i>Page</i>
Gray v. Halg, 20 Beav. 219.....	177
Green & Coates Streets Passenger Ry. Co. v. Bresmer, 1 Out. 103....	373
Green v. Irving, 28 Am. Rep. 366.....	637
Griffith v. Maxwell, 19 Wash. 614.....	659
Grimm v. Curley, 43 Cal. 250.....	18
Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y., 391.....	450
Guaranty Savings Bank v. Bladow, 176 U. S. 448.....	65
Gude v. Mankato, 30 Minn. 256.....	129
Gunderson v. Cochrane, 3 Wash. 476.....	605
Hall v. Robinson, 25 Iowa, 91.....	414
Hall v. Union Central Life Ins. Co. 23 Wash. 610.....	259
Hallam v. Tillinghast, 19 Wash. 20.....	604
Hamer v. Giles, 11 Ch. Div. 942.....	182
Hart v. Niagara Fire Ins. Co., 9 Wash. 620.....	260
Hasselman v. McKernan, 50 Ind. 441.....	399
Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141.....	450
Hatch v. Ferguson, 57 Fed. 966.....	357
Hathaway v. Lynn, 75 Wis. 186.....	94
Hawks v. Votaw, 1 Wash. 70.....	471
Hays v. Pacific Mail Steamship Co., 17 How. 596.....	96
Heath v. McCrea, 20 Wash. 342.....	213
Hennessey v. Muhleman, 57 N. Y. Supp. 854.....	502
Henschel v. Oregon Fire, etc., Ins. Co., 4 Wash. 476.....	259
Herrington v. Clark, 56 Kan. 644.....	643
Heslop v. Metcalfe, 3 Myl. & C. 183.....	511
Hewitt v. Steele, 136 Mo. 327.....	56
Hickman v. Alpaugh, 21 Cal. 226.....	463
Hill v. Grigsby, 32 Cal. 56	463
Hill v. Hill, 7 Wash. 409.....	472
Hitchcock v. Nixon, 16 Wash. 281.....	70
Hoexter v. Judson, 21 Wash. 646.....	120
Hollister v. Simonson, 55 N. Y. Supp. 372.....	180
Holmes v. Broughton, 10 Wend. 77.....	464
Holmes v. Danforth, 83 Me. 139.....	639
Hopt v. Utah, 120 U. S. 430.....	421
Hosford v. Johnson, 74 Ind. 481.....	399
Hosford v. Nichols, 1 Paige 220.....	464
Howard v. Carpenter, 11 Md. 259.....	218
Howard v. Shaw, 10 Wash. 151.....	71
Hoyt v. McNeil, 13 Minn. 390.....	464
Hubbard v. Apthorp, 3 Cush. 419.....	636
Huggins v. Dabbs, 57 Ark. 628.....	472
Hughes v. Momence, 163 Ill. 535.....	309
Hull v. Augustine, 23 Wis. 383.....	464
Hull v. Stephenson, 19 Wash. 572.....	206
Hull v. Vining, 17 Wash. 352.....	669
Hurlbert v. Brigham, 56 Vt. 368.....	511
Illinois, etc., R. R. Co. v. Houghton, 126 Ill. 233.....	395
Illinois, etc., R. R. Co. v. Moore, 160 Ill. 9.....	395
Illinois, etc., R. R. Co. v. O'Connor, 154 Ill. 550.....	395
Illinois, etc., R. R. Co. v. Wakefield, 173 Ill. 564.....	395
In re Barker's Estate, 5 Wash. 390.....	472
In re Fox, 52 N. Y. 535.....	639
In re Sullivan's Estate, 25 Wash. 430.....	542
In re Van Alstine, 21 Wash. 194.....	530

CASES CITED.

xvii

	<i>Page</i>
In re Wellman, 20 Vt. 653.....	613
In re Wilson, 12 Fed. 235.....	511
Irving v. McLean, 4 Blackf. 52.....	464
Izard v. Kimmell, 26 Neb. 51.....	94
Jacobs v. Elliott, 104 Cal. 318.....	281
Janes v. Jenkins, 34, Md. 1.....	642
Joerdens v. Schrimpf, 77 Mo. 383.....	71
Johnson v. De Bary-Baya Merchants' Line, 37 Fla. 499.....	101
Jones v. Laney, 2 Tex. 342.....	464
Jones v. Reed, 3 Wash. 57.....	224
Jones v. Williams, 139 Mo. 1.....	484
Kansas City, etc., R. R. Co. v. Whitehead, 109 Ala. 495.....	275
Kansas Pacific Ry. Co. v. Dunmeyer, 19 Kan. 539.....	643
Kavanagh v. Wilson, 70 N. Y. 177.....	524
Kelley v. Greenleaf, 14 Fed. Cas. 238.....	177
Kilroy v. Mitchell, 2 Wash. 407.....	620
Kimball v. School District, 23 Wash. 520.....	382
King County v. Hill, 1 Wash. 404.....	620
King County v. Neely, 1 Wash. T. 241.....	207
King v. State Mutual Fire Ins. Co., 54 Am. Dec. 683.....	450
King v. Texas Banking & Ins. Co., 58 Tex. 669.....	55
Kinsey v. Minnick, 43 Md. 112.....	218
Kizer v. Caufield, 17 Wash. 417.....	353
Knapp v. King County, 14 Wash. 568.....	380
Krider v. Milner, 99 Mo. 145.....	17
Kromer v. Friday, 10 Wash. 621.....	473
Krutz v. Gardner, 18 Wash. 332.....	399
Kutz v. McCune, 22 Wis. 628.....	639
Lake Pleasant Water Co. v. Contra Costa Co., 67 Cal. 659.....	551
Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59.....	90
Landes Estate Co. v. Clallam County, 19 Wash. 570.....	381
Lane v. Spokane Falls & Northern Railway Co., 21 Wash. 119.....	376
Larned v. Dubuque, 86 Iowa, 166.....	512
Lee v. Clark, 89 Mo. 553.....	71
Levy v. Yerga, 25 Neb. 764.....	18
Long v. Elsenbels, 18 Wash. 423.....	471
Long v. Pierce County, 22 Wash. 330.....	94
Loomis v. Bedel, 11 N. H. 74.....	637
Loomis v. People, 67 N. Y. 322.....	558
Lord v. Belknap, 1 Cush. 279.....	90
Lupton v. White, 15 Ves. Jr. 439.....	180
McAuliff v. Parker, 10 Wash. 141.....	17
McBride v. Board, 44 Fed. 17.....	639
McClung v. Condit, 24 Minn. 45.....	217
McCulloch v. Maryland, 4 Wheat. 316.....	12
McDonald v. Railroad Co., 93 Tenn. 281.....	511
McDonough v. Great Northern Ry. Co., 15 Wash. 244.....	370
McGary v. Hastings, 39 Cal. 360.....	643
McGear v. Woodruff, 33 N. J. Law 213.....	626
McGinnis v. Genss, 25 Wash. 490.....	665
McNamee v. Tacoma, 24 Wash. 591.....	213
McQuillan v. Seattle, 10 Wash. 464.....	239
Malsh v. Arizona, 164 U. S. 599.....	9

	<i>Page</i>
Manning v. Leighton, 65 Vt. 84.....	511
Marsters v. Lash, 61 Cal. 622.....	463
Martin v. State, 24 Tex. 62.....	642
Mason v. Culbert, 108 Cal. 247.....	282
Mason v. State, 29 Tex. App. 608.....	414
Mason v. Wash., 1 Breese, 39.....	464
Mather v. Rillston, 156 U. S. 391.....	371
Matter of Welman, 20 Vt. 653.....	613
Matthews v. Lake Shore, etc., Ry. Co., 110 Mich. 170.....	395
Meler v. Kelly, 22 Or. 136.....	573
Merrill v. Tobin, 82 Iowa 529.....	537
Meservey v. Snell, 94 Iowa, 222.....	643
Metcalfe v. Seattle, 1 Wash. 297.....	582
Metzger v. Burnett, 5 Kan. App. 374.....	27
Miller v. Commonwealth, 78 Ky. 15.....	558
Montana Ry. Co. v. Warren, 137 U. S. 348.....	253
Montgomery v. Reed, 69 Me. 510.....	639
Moran v. New Orleans, 112 U. S. 69.....	100
Morgan v. Bell, 3 Wash. 554.....	77
Morgan v. Parham, 16 Wall, 471.....	98
Morrill v. Morrill, 20 Or. 96.....	352
Morris v. Eastside Ry. Co., 95 Fed. 13.....	57
Mortimer v. Marder, 93 Cal. 172.....	463
Morton v. State, 1 Lea. 498.....	413
Munger v. Waterloo, 83 Iowa 559.....	129
Munson v. Syracuse, etc., R. R. Co., 103 N. Y. 58.....	497
Murne v. Schwabacher Bros. & Co., 2 Wash. T. 130.....	358
Murphy v. Nassau Electric Ry. Co., 46 N. Y. Supp. 283.....	247
Mutual Benefit Life Ins. Co. v. Elizabeth, 42 N. J. Law. 235.....	647
National Bank v. Matthews, 98 U. S. 621.....	393
National Christian Association v. Simpson, 21 Wash. 16.....	424
National Dredging Co. v. State, 99 Ala. 462.....	102
Naylor v. Colville, 47 N. Y. Supp. 267.....	399
Nels v. Farquharson, 9 Wash. 508.....	121
New Orleans, etc., Co. v. Southern, etc., Co., 53 Ala. 211.....	551
Newsome v. Davis, 133 Mass. 343.....	56
New Whatcom v. Bellingham Bay Imp. Co., 18 Wash. 181.....	213
New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131.....	213
New York Indians, 5 Wall. 761.....	12
Nietert v. Trentman, 104 Ind. 390.....	577
Northern Counties Investment Trust, Ltd., v. Enyard, 24 Wash. 366..	395
Northern Liberties v. St. John's Church, 13 Pa. St. 104.....	309
Northern Pacific R. R. Co. v. Heflin, 83 Fed. 93.....	109
Northern Pacific R. R. Co. v. Smith, 171 U. S. 260.....	389
Northern Pacific R. R. Co. v. Spokane, 64 Fed. 506.....	393
Northern Pacific R. R. Co. v. Traill County, 115 U. S. 600.....	9
Norton v. London, etc., Ry. Co., L. R. 13 Ch. Div. 268.....	395
Northwestern Lumber Co. v. Aberdeen, 22 Wash. 404..	211
Northwestern Lumber Co. v. Chehalis County, 25 Wash. 95.....	672
Noyes v. King County, 18 Wash. 420.....	380
Nye v. Kelly, 19 Wash. 73.....	121
Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717....	452. 458
O'Connell v. Taney, 16 Colo. 353.....	28
O'Conner v. Wilson, 57 Ill. 226.....	577
Olympia Water Works v. Gelbach, 16 Wash. 482.....	379

CASES CITED.

xix

	<i>Page</i>
Oregon Trust Co. v. Shaw, 5 Sawy. 336.....	71
Osborne v. Detroit, 32 Fed. 36.....	129
O'Shea v. Rice, 40 Neb. 893.....	590
Page v. Parker, 40 N. H. 48.....	254
Parker v. Dacres, 2 Wash. T., 440.....	402
Parks v. Watson, 20 Fed. 764.....	537
People v. Cochran, 61 Cal. 548.....	246
People v. Justices, 74 N. Y. 406.....	626
People v. Rae, 66 Cal. 423.....	558
People v. Riley, 65 Cal. 107.....	246
People v. Shaw, 57 Mich. 403.....	558
People ex. rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268.....	508
Percival v. Cowychee Irrigation, etc., District, 15 Wash. 480.....	126
Perkins v. Locke, 27 S. W. 783.....	90
Philadelphia, etc., Trust Co. v. New Whatcom. 19 Wash. 225.....	212
Phillips v. Port Townsend Lodge, 8 Wash. 529.....	115
Phillips, etc., Construction Co. v. Seymour, 91 U. S. 646.....	88
Pioneer Savings & Loan Co. v. Providence, etc., Ins. Co., 17 Wash. 175	
.....	450, 457
Pittsburg, etc., Ry. Co. v. Stickley, 155 Ind. 312.....	394
Plant v. Macon Oil & Ice Co., 103 Ga. 666.....	503
Potter v. New Whatcom, 20 Wash. 589.....	211
Potwin v. Blasher, 9 Wash. 460.....	620
Preble v. Maine Central R. R. Co., 85 Me. 260.....	17
Purdy v. Davis, 13 Wash. 165.....	472
Quinchard v. Board of Trustees of Alameda, 113 Cal. 664.....	207
Quock Ting v. United States, 140 U. S. 417.....	525
Railway Co. v. McShane, 22 Wall. 444.....	9
Railway Co. v. Prescott, 16 Wall. 603.....	7
Ralph v. Lomer, 3 Wash. 401.....	115
Randall v. Collins, 58 Tex. 231.....	577
Rape v. Heaton, 9 Wis. 328.....	464, 577
Rauh v. Scholl, 19 Wash. 30.....	604
Reeves v. Hayes, 95 Ind. 521.....	71
Reichenbach v. Sage, 13 Wash. 364.....	429
Reichenbach v. Washington, etc., Ry. Co., 10 Wash. 357.....	571
Reld v. Reld, 74 Iowa 681.....	343
Reitmair v. Siegmund, 13 Wash. 624.....	364
Remington v. Price, 13 Wash. 76.....	620
Republic of Honduras v. Soto, 112 N. Y. 310.....	642
Richardson v. Loupe, 80 Cal. 490.....	472
Riddell v. Brown, 25 Wash. 514.....	592
Ripple v. Ripple, 1 Rawle, 386.....	464
Robbins v. Springfield St. Ry. Co., 135 Mass. 30.....	239
Roberts v. Shelton Southwestern R. R. Co., 21 Wash. 427.....	471
Roberts v. Spokane Ry. Co., 23 Wash. 325.....	237
Roberts v. Township of Charlevoix, 60 Mich. 197.....	101
Rodgers v. Rodgers' Admr. 31 S. W. 139.....	472
Rogers v. Holyoke, 14 Minn. 220.....	399
Ruege v. Gates, 71 Wis. 634.....	94
Sadler v. Niesz, 5 Wash. 182.....	620
Sampson v. Somerset Iron Works Co., 6 Gray 120.....	176
Sawyer v. Dooley, 21 Nev. 390.....	308
Sayward v. Thayer, 9 Wash. 22.....	218

	<i>Page</i>
Schaefer v. Causey, 8 Mo. App. 142.....	537
Schleicher v. Gatlin, 85 Tex. 270.....	17
Scoville v. Calhoun, 76 Ga. 269.....	275
Sea v. Carpenter, 16 Ohio, 412.....	175
Shaw v. President, etc., of the Village of Sun Prairie, 74 Wis. 105....	129
Shea v. St. Paul City Ry. Co., 50 Minn. 395.....	239
Shed v. Augustine, 14 Kan. 282	464
Sheel v. Appleton, 49 Wis. 125.....	121
Shuey v. Adair, 18 Wash. 188.....	589
Shumway v. Leakey, 67 Cal. 458.....	463
Sievers v. Dalles, P. & A. Nav. Co., 24 Wash. 302.....	672
Silverstein v. Stern, 21 La. An. 743.....	218
Slater v. Skirving, 51 Neb. 108.....	666
Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264.....	505
Smith v. Wingard, 3 Wash. T. 291	571
Soule v. Seattle, 6 Wash. 315.....	212
Spahr v. Schofield, 66 Ind. 168.....	551
Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172.....	506
Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653.....	670
Spring Co. v. Edgar, 99 U. S. 658.....	253
Spurlock v. Port Townsend Southern R. R. Co., 12 Wash. 34.....	146
State v. Ackles, 8 Wash. 462.....	294
State v. Baughman, 38 Ohio St. 455.....	276
State v. Boyce, 24 Wash. 514.....	423
State v. Clinton, 26 La. An. 561.....	310
State v. Coates, 22 Wash. 601.....	422
State v. Concannon, 25 Wash. 327.....	422
State v. Crotts, 22 Wash. 245.....	375
State v. Englemann, 106 Mo. 628.....	551
State v. Glenn, 54 Md. 572.....	625
State v. Herold, 9 Kan. 194.....	642
State v. Holedger, 15 Wash. 443.....	409
State v. Levan, 23 Wash. 547.....	294
State v. Maginnis, 26 La. An. 558.....	310
State v. Rels, 38 Minn. 371.....	310
State v. Walters, 7 Wash. 246.....	418
State v. Woods, 49 Kan. 237.....	414
State ex. rel. Attorney General v. Janesville Water Power Co., 32 L. R. A. 391.....	391
State ex. rel. Bickford v. Benson, 21 Wash. 365.....	147
State ex. rel. Wolferman v. Superior Court, 8 Wash. 591.....	424
Steele v. Northern Pacific Ry. Co. 21 Wash. 287.....	239
Stetson Post Mill Co. v. McDonald, 5 Wash. 496.....	475
Sullivan v. Mayor, 68 Hun. 544.....	512
Sumner v. Reicheniker, 9 Kan. 320.....	176
Syndicate Ins. Co. v. Bohn, 65 Fed. 165.....	450
Taylor v. Boardman, 25 Vt. 581.....	464
The New York Indians, 5 Wall. 761.....	12
Thompson v. Huron Lumber Co. 4 Wash. 600.....	35
Thompson v. Savage, 47 Iowa 522.....	537
Thompson v. Sines 18 Wash. 361.....	183
Tledt v. Carstensen, 61 Iowa 334.....	207
Tillman v. Reynolds, 48 Ala. 365.....	511
Tingley v. Fairhaven Land Co., 9 Wash. 34.....	94
Tissue v. Baltimore & Ohio R. R. Co., 112 Pa. St. 91.....	373

CASES CITED.

xxi

	<i>Page</i>
Tracey v. Town of Phelps, 22 Fed. 634.....	525
Trumbull v. School District, 22 Wash. 631.....	666
Tucker v. Massachusetts Central Railroad, 118 Mass. 546.....	254
Union National Bank v. Forsyth, 50 La. An. 770.....	56
United States v. Budd, 144 U. S. 154.....	67
United States v. Clark County, 96 U. S. 211.....	647
United States v. Copeland, 5 Land Dec. Dep. Int. 170.....	64
United States v. Fox, 94 U. S. 315.....	639
United States v. Newman, 15 Land Dec. Dep. Int. 224.....	65
United States v. Richardson, 5 Land Dec. Dep. Int. 253.....	64
United States v. Thomas, 9 Land Dec. Dep. Int. 576.....	65
Van Dusen v. Kelleher, 20 Wash. 716.....	316
Van Horne v. Watrous, 10 Wash. 525.....	142
Vennum v. Gregory, 21 Iowa 326.....	175
Victor Gold & Silver Mining Co. v. National Bank, 15 Utah 391.....	149
Wadsworth v. Union Pacific Ry. Co., 18 Colo. 600.....	308
Walmsley v. Walmsley, 3 Jones & L. 556.....	175
Wardell v. Railroad Co., 103 U. S. 651.....	149
Washington Dredging & Imp. Co v. Partridge, 19 Wash. 62.....	517, 592
Washington Iron Works Co. v. King County, 20 Wash. 150.....	136
Washington Rock Plaster Co. v. Johnson, 10 Wash. 445.....	620
Wells v. Mayor and Aldermen of Savannah, 87 Ga. 397.....	137
Welsh v. Brown, 50 N. J. Eq. 387.....	182
Whallon v. Kauffman, 19 Johns. 97.....	635
Whatcom County v. Fairhaven Land Co., 7 Wash. 102.....	379
Wheeler v. F. A. Buck & Co., 23 Wash. 679.....	520
Whidby Land, etc., Co. v. Nye, 5 Wash. 301.....	655, 670
White v. Lady Lincoln, 8 Ves. Jr. 371.....	180
Whitin v. Paul, 13 R. I. 40.....	55
Wickham v. Sprague, 18 Wash. 466.....	388
Wilbur v. Lynde, 49 Cal. 290.....	149
Wiley v. New Orleans, 87 Fed. 843.....	110
Willmott v. Barber, L. R. 15 Ch. Div. 105.....	392
Wilson v. Aberdeen, 19 Wash. 89.....	210
Windsor v. Sage, 6 Land Dec. Dep. Int. 440.....	64
Winston v. Spokane, 12 Wash. 524.....	212
Wiss v. Stewart, 16 Wash. 376.....	5
Withers v. Larrabee, 48 Me. 570.....	218
Woffenden v. Board of Supervisors of Pima County, 1 Ariz. 237.....	281
Worcester v. Lord, 56 Me. 265.....	17
Zoll v. Soper, 75 Mo. 460.....	27

STATUTES CITED AND CONSTRUED

Organic Act, Rev. St. U. S., section 1865.....	358
Organic Act, Rev. St. U. S., section 1874.....	358
Organic Act, Rev. St. U. S., section 1917.....	358
Constitution, article 1, section 29.....	265
Constitution, article 2, section 19.....	126
Constitution, article 2, section 31.....	612
Constitution, article 4, section 10.....	267
Constitution, article 7, section 9.....	306
Constitution, article 8, section 3.....	583
Constitution, article 8, section 6.....	310, 581
Constitution, article 11, section 2.....	583
Constitution, article 11, section 5.....	266
Constitution, article 11, section 8.....	265
Constitution, article 11, section 10.....	304, 583
Constitution, article 14, sections 1, 2.....	583
Constitution, article 23, sections 1, 2.....	583
Code 1881, section 551.....	358
Code 1881, section 2138.....	358
Code Procedure, 1891, section 379.....	620
Code Procedure, 1891, sections 462, 463.....	534
Ballinger's Code, title 28, chapter 17.....	655, 669
Ballinger's Code, section 134, subdivision 1.....	290
Ballinger's Code, section 240.....	475
Ballinger's Code, section 342.....	205
Ballinger's Code, section 359.....	204
Ballinger's Code, section 734.....	304
Ballinger's Code, section 739, subdivisions 2, 4, 10, 13, 14.....	304
Ballinger's Code, section 739, subdivision 36.....	623
Ballinger's Code, sections 741, 742.....	305
Ballinger's Code, section 1609.....	280
Ballinger's Code, section 1846.....	582
Ballinger's Code, section 2945.....	607
Ballinger's Code, section 2947.....	609
Ballinger's Code, sections 3771—3782.....	652
Ballinger's Code, section 4176.....	93
Ballinger's Code, section 4257.....	496
Ballinger's Code, section 4275.....	505
Ballinger's Code, section 4491.....	463
Ballinger's Code, section 4533.....	475
Ballinger's Code, section 4565.....	513
Ballinger's Code, section 4620, subdivision 8.....	296
Ballinger's Code, section 4669.....	146
Ballinger's Code, section 4676.....	603
Ballinger's Code, section 4683.....	624
Ballinger's Code, section 4772.....	511
Ballinger's Code, section 4796.....	388
Ballinger's Code, section 4797.....	388, 572
Ballinger's Code, section 4798.....	401
Ballinger's Code, section 4805.....	400
Ballinger's Code, section 4826.....	5

	<i>Page</i>
Ballinger's Code, section 4835	513
Ballinger's Code, section 4846	51
Ballinger's Code, section 4860	348
Ballinger's Code, section 4886 a.....	656
Ballinger's Code, section 4889	155
Ballinger's Code, section 4896	657
Ballinger's Code, section 4930	665
Ballinger's Code, section 4953	656, 669
Ballinger's Code, section 5022	77
Ballinger's Code, section 5029	620
Ballinger's Code, section 5058	154
Ballinger's Code, section 5062	146
Ballinger's Code, sections 5080, 5080 a.....	656
Ballinger's Code, sections 5085-5087	263
Ballinger's Code, section 5090	666
Ballinger's Code, section 5153	470, 573, 655, 659, 670
Ballinger's Code, section 5154	470, 573
Ballinger's Code, section 5155	470, 573, 659
Ballinger's Code, section 5156	470, 573, 655, 659
Ballinger's Code, section 5157	470, 573, 655
Ballinger's Code, section 5158	671
Ballinger's Code, section 5161	655
Ballinger's Code, section 5359	183
Ballinger's Code, sections 5376—5378	191
Ballinger's Code, section 5380	184
Ballinger's Code, section 5500	570
Ballinger's Code, section 5501	571
Ballinger's Code, section 5527	491, 665
Ballinger's Code, section 5536	116
Ballinger's Code, section 5640	552
Ballinger's Code, section 5760	619
Ballinger's Code, section 5761	618
Ballinger's Code, section 5775	618
Ballinger's Code, section 5798, subdivision 5.....	528
Ballinger's Code, sections 5800, 5801.....	528
Ballinger's Code, section 5826	530
Ballinger's Code, section 6108	296
Ballinger's Code, section 6110	297
Ballinger's Code, section 6112	296
Ballinger's Code, section 6141	435, 542
Ballinger's Code, section 6333	436, 543
Ballinger's Code, section 6500	183, 424
Ballinger's Code, section 6503	183
Ballinger's Code, section 6506	629
Ballinger's Code, section 6510.....	146
Ballinger's Code, section 6758	204
Ballinger's Code, section 6942	349
Ballinger's Code, section 6947	407
Ballinger's Code, sections 6965, 6966.....	415
Ballinger's Code, section 6993	272, 612
Ballinger's Code, section 6994	273
Ballinger's Code, section 6995	272, 613
Ballinger's Code, section 6996	273
Ballinger's Code, section 7435	623
Laws 1875, page 20.....	659

STATUTES CITED.

xxv

	<i>Page</i>
Laws 1885-86, pages 238—243.....	399
Laws 1887-88, page 12	645
Laws 1887-88, page 24	354
Laws 1889-90, page 37	645
Laws 1889-90, page 302	265
Laws 1889-90, page 314	645
Laws 1889-90, page 671	81
Laws 1889-90, page 677, section 11.....	93
Laws 1891, page 44	659
Laws 1893, page 20, section 1.....	572
Laws 1893, page 120, section 1, subdivision 7.....	424
Laws 1893, page 335, section 26	138
Laws 1893, page 351, section 64	646
Laws 1895, page 86, section 12	205
Laws 1895, page 109	5
Laws 1895, page 197	541
Laws 1895, page 409	266
Laws 1897, page 23	513
Laws 1897, page 136	645
Laws 1897, page 166, section 62	646
Laws 1897, page 175, section 82	533
Laws 1897, page 356	124
Laws 1897, page 385, section 71	124
Laws 1897, page 424, section 171	124
Laws 1899, page 135	624
Laws 1899, page 194, section 1	562
Laws 1899, page 234	302
Laws 1899, page 324, section 25	124
Laws 1901, page 100	272
Laws 1901, page 129	284
Laws 1901, page 213	550
Laws 1901, page 289	266
Laws 1901 (extra session), page 3	613
Laws 1901 (extra session), page 14	291
Charter, Seattle, Laws 1885-86, page 243, section 10.....	399
Charter, Seattle (Freeholders), article 8, section 11, subdivision 1...	306

ERRATA

Page 56. Seventh line from top, read *pledgor* in place of "pledger."
 Page 193. Fifth line from top, read *plaintiff's* in place of "plaintiff."
 Pages 555-557. Running title, read *v.* in place of "ex rel."
 Page 665. Top of page, read *Reavis, C. J.*, in place of "Reavis, J."

GENERAL RULES OF THE SUPREME COURT

(Adopted July 15, 1901.)

RULE I.

COURT RECORDS AND BOOKS.

The Clerk of the Supreme Court shall keep the following books and records:

1. Journal.
2. Record of opinions.
3. Appearance docket.
4. Motion docket.
5. Execution docket.
6. Fee book.
7. General index of cases.

8. In addition to the foregoing, the said clerk shall keep books in which shall be stated proper accounts of all moneys received and disbursed.

RULE II.

DOCKET FEES.

The Clerk of the Supreme Court will not file any transcript until the appellant shall have deposited with him the sum of ten dollars as an advance docket fee, and he will not file any paper in any original motion, application or proceeding until the moving party shall have deposited a like sum for the same purpose.

RULE III.

TRANSCRIPTS.

1. Every transcript shall be plainly written or printed on paper of good quality, of the size of legal cap, and be free from interlineations and erasures, and be duly paged and prefixed with an alphabetical index to its contents, specifying the page of each separate paper, order or pro-

ceeding, and of the testimony of each witness, and have at least one blank fly leaf: *Provided*, The statement of facts and bill of exceptions must in every case be printed or typewritten, and when typewritten none other than the ribbon copy shall be used.

2. Every transcript consisting of more than fifty leaves shall be bound under the direction of the Clerk of the Supreme Court at the expense of the appellant, and the cost of binding be taxed in the cause as other disbursements.

RULE IV.

TRANSCRIPTS—OMISSIONS.

If any paper or part of the record directed to be sent up has been omitted from the transcript in any case, such omission may be supplied at any time before the cause is assigned for hearing by any party, without leave, by filing a properly certified transcript of such paper or part of the record with the Clerk of the Supreme Court, and at the same time giving the opposite party notice thereof.

RULE V.

CLERK'S CERTIFICATE.

1. Transcripts must be certified by the Clerk of the Superior Court in substantially the following form:

STATE OF WASHINGTON,.....COUNTY, ss.

I,....., Clerk of the.....Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court this....day of....., 190...

(Seal.)

....., Clerk,
By....., Deputy.

2. Supplemental records shall be certified by the Clerk of the Superior Court substantially in the same manner.

RULE VI.

TAKING PAPERS FROM CLERK'S OFFICE.

No paper filed with the Clerk of the Supreme Court shall be taken from the court room or clerk's office except by permission of the court or one of the justices, and when so taken a receipt in writing therefor must be left with the clerk. Permission to take papers will not be granted except to a party, or his attorney, who shall have entered an appearance in the Supreme Court in the cause in which such paper is filed.

RULE VII.

ADDITIONAL AUTHORITIES.

In case either party, after filing of briefs, desires to submit additional authorities, the same shall be submitted not less than one day prior to the hearing of the appeal. Said authorities so submitted shall be written or printed, and nine copies thereof shall be filed with the Clerk of the Supreme Court, and not less than one copy served upon the adverse party. In citing such authorities parties shall be governed by Rule VIII.

RULE VIII.

CONTENTS AND STYLE OF BRIEFS.

1. Briefs shall be printed throughout in plain, clear type, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification.
2. Each error relied on shall be clearly pointed out.
3. In citing authorities, the names and numbers of volumes and the titles of cases must be clearly set out; and in citing text books the number of the edition must be specified.
4. Briefs must be of the following dimensions, to-wit: 8½ inches from top to bottom; 6½ inches from edge to

edge, inclusive of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The title of the cause must be on the front cover in full.

5. In all equity causes and actions at law tried by the court without a jury, the party or parties appealing shall print in their brief the findings of fact, with the exceptions thereto, on which any question is sought to be raised by them on the appeal, and shall also print such findings as they requested the lower court to make, which were refused, with their exception to such refusal, in case any error or contention shall be based thereon.

RULE IX.

ASSIGNMENT OF CAUSES.

1. For the purpose of hearings in the Supreme Court, causes for the several counties will be assigned as follows:

1. Thurston. 2. Mason. 3. Lewis. 4. Chehalis. 5. Pierce. 6. King. 7. Kitsap. 8. Pacific. 9. Wahkium. 10. Cowlitz. 11. Clark. 12. Skamania. 13. Snohomish. 14. Skagit. 15. Whatcom. 16. Island. 17. San Juan. 18. Jefferson. 19. Clallam. 20. Kittitas. 21. Yakima. 22. Klickitat. 23. Chelan. 24. Okanogan. 25. Douglas. 26. Adams. 27. Lincoln. 28. Franklin. 29. Walla Walla. 30. Columbia. 31. Asotin. 32. Garfield. 33. Whitman. 34. Spokane. 35. Stevens. 36. Ferry.

2. Exceptions to this order may be made when public interests so require.

3. Ten days before the beginning of each session of the court the clerk shall assign for hearing in the order named in subdivision 1 of this rule, all causes then on the docket and ready for hearing. A cause on the docket of the court shall be deemed ready for hearing when it appears that the manuscript is on file; and—

(a) That the appellant's opening brief, the respondent's brief, and the appellant's reply brief are on file;

(b) That the appellant's brief and respondent's brief are on file, and the latter has been served upon the appellant for a period of ten days or more;

(c) That the appellant's brief is on file, and has been served upon the respondent for a period of forty days or more;

(d) That the appellant's opening brief and the respondent's brief are on file, and more than twenty days will elapse between the time of service of the respondent's brief and the time the cause is fixed on the calendar for hearing;

(e) That the appellant's brief is on file, and all parties to the appeal have stipulated that the cause may be assigned for hearing at such session.

4. Cases ready for hearing may be submitted on briefs by stipulation, at any time, and when so submitted, shall be entitled to as prompt consideration as other cases then before the court.

RULE X.

CALENDAR.

As soon as the causes shall have been assigned for a regular session of the court, the clerk shall print a calendar thereof, and mail a copy of the calendar to each attorney or firm having any cause thereon.

RULE XI.

ARGUMENTS.

No more than two counsel on a side will be heard upon the argument of any question, unless the court shall direct otherwise: *Provided*, That each party who has appeared separately and by different counsel in the Superior Court shall, if he so desire, be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument upon the merits in all cases. In argument of motions and all preliminary or collateral matters,

the counsel for the party having the affirmative of the issue shall open and close. Arguments upon the merits shall be limited to one-half hour upon a side, and all other arguments to one-quarter of an hour upon a side, unless an extension of time be obtained from the court before the argument is commenced.

RULE XII.

ERRORS CONSIDERED.

No alleged error or mistake of the Superior Court will be considered by the Supreme Court unless the same be clearly pointed out in the appellant's brief: *Provided*, That the objection that this court has no jurisdiction of the appeal may be taken at any time.

RULE XIII.

REHEARINGS.

1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for a rehearing of the same question shall be filed; *Provided*, That the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon.

2. One typewritten copy of the petition for rehearing, filed with the clerk, shall be sufficient.

3. When a decision is rendered upon a petition for rehearing, the clerk shall promptly notify counsel for the respective parties.

RULE XIV.

COST BILLS.

1. The prevailing party shall, within ten days after the filing of the opinion in a case, file with the clerk a cost bill, and serve upon the adverse party a copy thereof. If any adverse party objects to any item or items thereof, he

shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the clerk of the court within ten days after service of the cost bill upon him. Whereupon the clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse party and file the same with the clerk within ten days after such taxation. Said exceptions shall be heard by the court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

2. If no cost bill is filed and served, the clerk will tax as costs only the clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney fee, and the cost of transcript at the rate of five cents a folio.

3. Where a cost bill has been served and filed in time, and no exceptions thereto filed, objections thereto will be deemed to have been waived.

RULE XV.

SUBMISSION ON FAILURE TO APPEAR.

Where a party does not appear when the cause is called for hearing, and the appeal has been perfected, and the brief of said party shall be on file, the cause, as regards such party, shall be deemed submitted. This rule shall not preclude oral argument by the opposite party.

RULE XVI.

RESPONDENT FILING NO BRIEF.

Where the respondent fails to file a brief in the cause, the court will take the submission of the same by the ap-

pellant, and decide upon the merits of the appeal, if it shall appear to have acquired jurisdiction of the cause.

RULE XVII.

MOTIONS—HOW MADE AND HEARD.

1. Motions to strike out any portion of the transcript, or to dismiss or affirm upon the record, and all technical motions tending to prevent the hearing of a cause upon its merits, may be made in writing and noticed for some Friday of the session, or the last Friday of any month of the year excepting the months of July and August, or the same may be made and plainly stated in the respondent's brief and heard at the time the cause is assigned upon the calendar.

2. All other motions in appealed causes must be made in writing, and noticed for some Friday of the session or for the last Friday of any month excepting the months of July and August at the opening of court on that day. The motions referred to in this and the first clause of the preceding paragraph will be known as *noticed motions*.

3. At least two days before the day set for the hearing of such motion, the motion and notice, with proof of service thereof, must be filed with the clerk. The clerk will prepare a calendar of noticed motions for each Friday, in the order of their filing, and they will be given precedence of other hearings on that day.

4. The Fridays of the weeks during the regular hearing of cases and the last Friday in each month excepting the months of July and August, are hereby designated as motion days.

RULE XVIII.

NOTICES OF MOTIONS.

1. All notices of motions not given in the briefs must be in writing; and the necessary time of notice shall be not less than ten days, unless a different time is fixed by

statute or the special order of this court. But where the service of a notice is made by mail between different places, the time of notice above mentioned shall be thirteen days.

2. Service of papers must in all cases be made upon the attorney of record of a party, if he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party.

RULE XIX.

SERVICE OF PAPERS.

Service of papers may be made as follows:

First: If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the postoffice to his address, with postage prepaid.

Second: If upon a party, by delivery to him personally, or at his residence, by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening.

RULE XX.

SERVICE—RESIDENCE UNKNOWN.

Where the residence of a party and his attorney of record, if he have one, is not known, the service may be made upon the Clerk of the Superior Court in which the cause was tried, for the party or attorney.

RULE XXI.

SERVICE BY MAIL.

1. Service may be made by mail when the person making the service and the person on whom such service is to

be made reside in different places, between which there is regular communication by mail; postage must in all such cases be prepaid.

2. Time shall begin to run from the date of deposit in the postoffice.

RULE XXII

HABEAS CORPUS.

1. A judge of the Supreme Court, when applied to for writs of *habeas corpus*, may make the same, if granted, returnable before himself or before the Supremo Court, or before any Superior Court of the state, or any judge thereof.

2. Upon such an application, however, the judge applied to may make an order to show cause why the writ should not issue returnable before the Supreme Court.

3. Unless there be special reasons to the contrary, writs of *habeas corpus* will be issued by the Supreme Court only after a hearing upon an order to show cause.

4. In all cases where the person whose release is sought to be obtained by original *habeas corpus* from this court is imprisoned in the penitentiary, or in a county jail, upon a charge or conviction of felony, service of the order to show cause and petition must be made upon the superintendent or sheriff, as the case may be, the prosecuting attorney of the county from whence the prisoner was committed, or in which he is confined, and the Attorney General at his office in Olympia.

5. Where the imprisonment is in a county jail upon a charge or conviction of misdemeanor, the service must be upon the prosecuting attorney and the sheriff of that county.

RULE XXIII.

OTHER ORIGINAL WRITS.

1. In all other cases of applications to the Supreme Court for original writs, under either its original or its ap-

pellate jurisdiction, the applicant shall show that he has given notice to the opposite party or his attorney of record of his intention to apply for such writ and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

2. The notice above required shall not be less than four nor more than fourteen days. Applications under this rule must be made on a regular motion day, unless there be some special emergency requiring earlier action.

3. The opposing party shall be at liberty to make any objections he sees fit upon the face of the papers presented with the application.

4. Upon the final hearing of any application under this rule, each side shall furnish for the use of the court, nine written or printed copies of their points and authorities.

RULES FOR THE ADMISSION OF ATTORNEYS TO PRACTICE IN THE COURTS OF THE STATE OF WASHINGTON.

RULE I.

TIMES FOR EXAMINATION.

The first Thursday and Friday of each session of the Supreme Court are hereby designated as the times when examination of applicants for admission to practice as attorneys and counselors at law shall take place.

RULE II.

EXAMINATION—WRITTEN AND ORAL.

Such examination shall be written and oral as hereinafter provided.

RULE III.**QUALIFICATIONS.**

Applicants for admission shall possess the qualifications required by statute.

RULE IV.**APPOINTMENT OF COMMITTEE.**

The Supreme Court will, from time to time, appoint a committee, composed of three members of the bar of the Supreme Court of the State of Washington, to aid and assist in the examination of applicants for admission.

RULE V.**FILING NOTICE OF APPLICATION.**

1. All persons making application for admission to the bar, as herein provided, shall file a notice of such application with the Clerk of the Supreme Court at least one week before the first Thursday of each session of the Supreme Court, and shall pay to such Clerk the sum of twenty dollars (\$20) in full of all fees, which sum shall be returned to the applicant in the event that his application for admission is denied.

2. Each application for examination shall be accompanied by the affidavit of the applicant showing that he has the qualifications required by the statute, and that he is not under sentence of suspension or disbarment of any court.

RULE VI.**BASIS OF EXAMINATION.**

Such examination shall be based upon written questions and the answers thereto and such oral questions as the committee shall see fit to propound.

RULE VII.

WRITTEN EXAMINATIONS.

The committee shall prepare and submit to the applicant numbered questions in writing, to be answered in writing.

While engaged in answering the questions the applicant shall be in a room free from interruption, and shall be upon honor not to communicate with any person, or to read any book or paper upon the subject of the answer to any question submitted to him.

Six hours will be allowed in which to prepare the written answers. The number of each question shall precede each answer. Each page of answers shall be signed by the applicant.

Immediately upon concluding his written answers the applicant shall deliver them to the committee.

RULE VIII.

ORAL EXAMINATIONS.

Upon the day following the applicant's written examination, he shall be examined orally in open court by the court or the committee, at such length as may be deemed proper.

RULE IX.

ADMISSION UPON EXAMINATION.

As soon as convenience will permit, the committee shall satisfy themselves, from the applicant's written and oral examinations, whether or not he should be admitted, and announce the result to the Supreme Court. The court shall then determine whether or not the applicant shall be admitted.

RULE X.

PRACTICE.

Admission to practice in the Supreme Court shall entitle an attorney to practice in all the courts of the state.

Any person a resident of the State of Washington heretofore admitted to practice in any of the Superior Courts of said state shall be entitled to admission in the Supreme Court upon the production of a certified copy of his admission and the filing of the same with the Clerk of the Supreme Court, together with his own affidavit that he is not under judgment of disbarment or suspension of any court. The fee for entering said admission and for certified copy of such record shall be five dollars (\$5).

RULE XI.

DISBARMENT AND SUSPENSION.

The judgment of disbarment or suspension of the Supreme Court, or of any Superior Court of this state, shall disqualify any attorney against whom the same is pronounced from practicing as an attorney in any of the courts of the state until the same shall be reversed or vacated; and any attorney who, while so disbarred or suspended, shall practice as an attorney, shall be deemed guilty of a contempt, and punished accordingly.

RULE XII.

RELATING TO ADMISSION.

In all cases where an examination is not required, personal attendance of an applicant shall not be necessary to obtain an order of admission, but the same may be had up-
no motion, upon taking the oath before any officer authorized to administer oaths, and submitting proof thereof with the further proofs required by Rule X, and the act approved March 19, 1895, as amended by the act approved February 16, 1897, respectively, and upon payment of the fee prescribed.

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON

[No. 3639. Decided April 22, 1901.]

MARY C. ROSS, *Appellant*, v. HENRY HOWARD *et al.*, *Respondents*.

25	1
27	728
25	1
31	897

INJUNCTION — RESTRAINING EXECUTION SALE OF HOMESTEAD — LIABILITY OF CREDITOR'S ATTORNEY.

In a complaint by a wife to restrain the judgment creditor of her husband and his attorney from selling the community real property upon a judgment for the separate debt of the husband, the complaint states no cause of action against the attorney, when it alleges that he has made various attempts to collect the judgment by attempted levy upon property which he knew was not subject to the judgment, and that, actuated by malicious motives, he had been perniciously active in the matter.

PLEADING — AMENDMENT OF COMPLAINT — ABUSE OF DISCRETION.

The fact that the court permits plaintiff to amend her complaint a number of times does not establish in itself an abuse of the discretion given the court in such matters.

SAME — DEPARTURE.

The fact that plaintiff, in an amended complaint adds what she calls "a supplementary amendment," stating that at a time subsequent to the commencement of the action plaintiff and her husband had selected a homestead in the premises in controversy and filed notice thereof pursuant to the provisions of the act of March 13, 1895, does not constitute a departure, where the original complaint had set up a claim of homestead, by alleging that the premises were then, and for more than ten years last past had been, the homestead of the husband and wife.

ACTION BY WIFE CLAIMING HOMESTEAD — NECESSARY PARTIES.

Under Bal. Code, § 4826, which provides that when the action concerns the wife's right or claim to the homestead property, she may sue alone, a wife may maintain an action in her own name to restrain the sale of the community realty in which she and her husband claim the right of homestead.

HOMESTEAD — MORTGAGE BY DEED ABSOLUTE ON FACE — EFFECT.

An absolute deed of conveyance of real property does not debar the grantor from setting up a claim of homestead therein, when the deed was intended merely as a mortgage.

SAME — TIME OF SELECTION.

Laws 1895, p. 109, which defines a homestead and provides for the manner of selecting the same does not affect prior existing statutes relating to homesteads, which provide that a debtor may select a homestead at any time before sale on execution.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Lewis & Lewis, for appellant.

R. L. Edmiston and William T. Birdsall, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Suit instituted by appellant against respondents to restrain them from selling certain real property described in the complaint under an execution upon a judgment against E. S. Ross, the husband of appellant, and in favor of respondent Howard. The complaint, in substance, alleges that the real property attempted to be levied upon is the community estate of appellant and her husband, E. S. Ross, and that the debt upon which Howard's judgment is founded is the separate debt of the husband; that the premises were and are the homestead of appellant and her husband; that a conveyance was theretofore made by appellant and her husband to one Linfield to secure an existing indebtedness, and, while in the form of an absolute deed, was in fact

April, 1901.] Opinion of the Court—REAVIS, C. J.

for security and for the purpose of preventing a cloud upon the title from the judgment of respondent Howard against the husband, E. S. Ross. The cause of action alleged against defendant Edmiston is that he, as the attorney of Howard, has made various attempts to collect the judgment, knowing that the property he attempted to levy upon was not subject to the judgment, and that he had been perniciously active in these matters, and was actuated in his action by malicious motives. Edmiston appeared separately, and demurred to the complaint on the following grounds:

“That the plaintiff has no legal capacity to sue; that there is a defect of the parties plaintiff; that several causes of action are improperly united; and that the complaint does not state facts sufficient to constitute a cause of action.”

The court sustained this demurrer upon two grounds: That the plaintiff has no legal capacity to sue, and that the complaint does not state facts sufficient to constitute a cause of action. The other respondents, Howard and Speck, jointly demurred to the complaint upon the same grounds, and their joint demurrer was sustained upon the two grounds mentioned.

The briefs of counsel on each side contain a great deal of irrelevant discussion relating to the apparent motives of counsel in the conduct of the cause in the superior court, and they have not considerably aided the court in the determination of the real controversy involved. We perceive no error in the ruling of the court upon the demurrer interposed by respondent Edmiston. He was acting as attorney for his client, and the general allegations relative to his motives or activity do not state any legal cause of action against him.

Counsel for respondents have devoted considerable at-

tention to the number of amended complaints filed by counsel for appellant. In one or two instances these complaints were stricken by the superior court, and terms were imposed upon the filing of the last amended complaint, which was by permission of the court. The various amendments to the complaint were purely in the discretion of the trial court, and no abuse is observed here in the exercise of such discretion.

Counsel for respondents further urge with vehemence that an additional cause of action was inserted in the last amended complaint, setting up a claim of homestead in connection with the wife's claim to protect community property against the judgment on a separate debt of her husband. But an examination of the pleadings shows that this cause of action was stated in the original complaint before process was issued. The allegation is found in the following form:

"That the aforesaid [described premises] are now, and for more than ten years last past have been, the homestead of this plaintiff and her husband aforesaid, E. S. Ross."

This allegation was carried through the subsequent amended complaints, and in the last amended complaint there was added what the pleader termed "a supplementary amendment," which stated that at a time which was subsequent to the commencement of this action the plaintiff and her husband had, under the act of March 13, 1895, selected the homestead and filed notice thereof, pursuant to the provisions of said act. This supplementary matter, relative to the filing of the notice of homestead, is entirely immaterial. The statement of the claim of homestead in the original complaint was a sufficient statement of this cause of action. Thus there was no departure from the original cause of action stated at the commencement of the suit. The right of the wife to main-

April, 1901.] Opinion of the Court—REAVIS, C. J.

tain a suit to protect the homestead is determined by the statute (Bal. Code, § 4826):

“When a married woman is a party, her husband must be joined with her, except,—When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.”

It is contended, however, that the complaint does not state a cause of action because of the allegation that the property was conveyed by appellant and her husband to Linfield, and therefore they could not maintain a homestead right therein. The rule has been stated otherwise by this court in *Wiss v. Stewart*, 16 Wash. 376 (47 Pac. 736). It was there observed:

“While it appears that the appellant had given what, on its face, purported to be a warranty deed to the land in question, on January 9, 1896, to one Davies, the testimony conclusively shows, and in fact there is no testimony tending to show to the contrary, that the deed was in fact a mortgage to secure a loan, and that a portion of the loan had since been paid.”

And it was held that the right to claim the premises was not defeated by the fact that they were mortgaged in that form. It was also determined in that case that the act of March 13, 1895 (Laws 1895, p. 109), does not affect the provision in relation to the time of making the selection of a homestead, but simply undertakes to direct the manner of such selection, and the provision, that such homestead may be selected at any time before sale, is still in effect. These views were again confirmed in *Anderson v. Stadlmann*, 17 Wash. 433 (49 Pac. 1070).

Under these authorities, which are controlling, the complaint states a cause of action against the respondents Howard, the judgment creditor, and sheriff Speck.

The cause is therefore reversed, with directions to the superior court to overrule the joint demurrer of Howard

and Speck, and for further proceedings in accordance with this opinion.

DUNBAR, FULLERTON, WHITE and ANDERS, JJ., concur.

[No. 3404. Decided April 23, 1901.]

JOHN S. PAGE *et ux.*, Appellants, v. PIERCE COUNTY *et al.*, Respondents.

INDIAN LANDS — SALE BY GOVERNMENT—EXEMPTION FROM TAXATION.

Under the rule that the states cannot tax lands which belong to the federal government or over which it has retained the right of control, lands on an Indian reservation, including those belonging to the government agency and those which have been assigned in severalty, pursuant to treaty, are exempt from state taxation, where they have been sold and deeded under act of Congress to purchasers from whom deferred payments thereon remain due, and, by the terms of the act, the deeds are conditioned that they should operate as a complete conveyance only upon full payment of the purchase money.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Reversed.

James Law and Herbert S. Griggs, for appellants.

George H. Walker and John A. Shackelford, for respondents.

The opinion of the court was delivered by

ANDERS, J.—Plaintiffs brought this action against Pierce county and Stephen Judson, its treasurer, to enjoin the collection of taxes on lands within the Puyallup Indian reservation, on the ground that the land is not subject to taxation by the state. The Puyallup reservation exists under and by virtue of a treaty with the Indians thereof, made on December 26, 1854. 10 Stat. at Large, 1132. In 1893 congress passed an act providing, with

April, 1901] Opinion of the Court—ANDERS, J.

the consent of the Indians, for the sale and disposal of the lands of this reservation (27 Stat. at Large, 612), and it is under this act that the plaintiffs have acquired whatever rights they have to the lands upon which the tax complained of was levied. The lands were offered for sale under the provisions of the act, and were purchased by the plaintiffs. One-third of the purchase price was paid down, and the remainder was to be paid in installments. Deeds were executed by the commissioners appointed for that purpose, conditioned that the deeds should operate as a complete conveyance of the land upon the full payment of the purchase money. The deferred payments had not been fully made at the time this action was commenced. The proceeds of the sale were to be placed in the treasury for the benefit of the Indians. The taxes mentioned in the complaint are for the year 1897. A portion of the lands over which this controversy arises was acreage, and had been patented to one of the Indians on said reservation, subject to certain conditions specified in the treaty. The lands were not subject to sale by the Indians, and there is no question as to the authority of the United States or of the commissioners acting by virtue of the authority of the act of 1893 to dispose of the lands. A demurrer to the complaint was sustained, and the plaintiffs have appealed from a judgment dismissing the action.

It is conceded that the lands were not subject to taxation prior to the execution of the deeds to the appellants, and the question for determination is whether the appellants by reason of the deeds above mentioned, have such a title to the lands in question that they are subject to taxation as their individual property. The case of *Railway Co. v. Prescott*, 16 Wall. 603, involved the right of the state of Kansas to tax the lands granted by congress in aid

of the construction of the Kansas Pacific Railway. Subsequently, in 1864, the original act making said grant was amended before any rights accrued to the company. The amendatory act provided (13 Stat. at Large, p. 365, § 21):

“That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest, as the titles shall be required by said company, which amount shall, without any further appropriation, . . . be used by the commissioner of the general land office for the prosecution of the survey of the public lands along the line of said road, and so from year to year until the whole shall be completed, as provided under the provisions of this act.”

The railway filed its bill to quiet its title to certain of the granted lands against one Prescott, setting up title only by virtue of this grant. The defendant set up a tax title under a sale for taxes assessed in 1868. It was conceded that at the time the lands were assessed the railroad company had performed all of the conditions precedent to acquiring a patent, except the payment of the costs of survey. The court held that the non-payment of the costs required to be paid by the statute exempted the lands from taxation. In the course of the opinion the court said:

“While we recognize the doctrine heretofore laid down by this court that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the *right* to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right. The present case does not fall within that principle.”

April, 1901] Opinion of the Court—ANDERS, J.

The reasons given by the court in this case for denying the right of the state to tax the railroad lands were that:

“If the company have such an interest in these lands that they can be sold by the state under her power of taxation, then the title is divested out of the government without its consent, and the right to recover the money expended in the surveys is defeated. As the government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the state cannot levy taxes on the land, and under such levy sell and make a title which might in any event defeat this right of the federal government reserved in the act by which the inchoate grant was made.”

The same views have been repeatedly expressed by the supreme court of the United States in subsequent decisions. See *Railway Co. v. McShane*, 22 Wall. 444; *Northern Pacific R. R. Co. v. Traill County*, 115 U. S. 600 (6 Sup. Ct. 201). In fact it is conceded that this was the rule established by the earlier decisions, but it is contended by respondents that later decisions of that court have overruled the earlier ones, and that now such lands are taxable, and they cite *Central Pacific R. R. Co. v. Nevada*, 162 U. S. 512 (16 Sup. Ct. 885), and *Maish v. Arizona*, 164 U. S. 599 (17 Sup. Ct. 193), in support of their contention. An examination of the case of *Central Pacific R. R. Co. v. Nevada*, *supra*, will disclose the fact that lands granted in aid of the construction of railroads were made taxable by an act of congress passed in 1886, notwithstanding the cost of survey and selection had not been paid by the company. This act was passed after the case of *Railway Co. v. Prescott*, and others announcing the same doctrine, had been decided, and expressly permitted the states to tax the interest owned by the railroad company; and the ruling in this case was based

entirely upon the provisions of that act. In *Maish v. Arizona*, 164 U. S. 599 (17 Sup. Ct. 193), one of the questions to be determined was whether the territory of Arizona had the right to tax certain lands included in a Mexican grant before there had been a confirmation of the grant by the government. The court, in considering this question, says:

“The cases relied upon are *Colorado Company v. Commissioners*, 95 U. S. 259, *Botiller v. Dominguez*, 130 U. S. 238, and *Astiazaran v. Santa Rita Land & Mining Co.*, 148 U. S. 80. In the first of these cases a Mexican land grant, covering some five hundred thousand acres, was confirmed by congress to the extent of eleven square leagues, with a proviso that there should be a survey of those leagues, and that the confirmation should not become legally effective until the claimant had paid the cost thereof; and it was held, following *Railway Company v. Prescott*, 16 Wall. 603, and *Railway Company v. McShane*, 22 Wall. 444, that until the survey fees had been paid the United States retained such an interest in the land as to exempt it from taxation. . . . It must be borne in mind that in the record before us these lands are not otherwise described than as Mexican land grants. For aught that appears, they may have been ‘perfect grants.’ ”

From the language employed and the reasoning of the court in the opinion in this case, we feel justified in concluding that, if it had been made to appear that the grant to the claimant was an “imperfect,” or, in other words, a conditional, one, the right to tax the land would have been denied.

It is, perhaps, needless to say that the act of congress of 1886, authorizing the taxing of certain railroad lands, confers no authority to tax any other lands in which the United States have an interest, as no other than railroad lands are mentioned in that act. We fail to see any indi-

April, 1901] Opinion of the Court—ANDERS, J.

cation on the part of the supreme court of the United States either in *Central Pacific R. R. Co. v. Nevada* or *Maish v. Arizona* (cited by respondents) to overrule, impugn, or modify its earlier decisions upon this question of taxation. Each case was decided strictly in accordance with the court's construction of the particular statute applicable thereto. In the railroad cases above cited the government had not parted with the legal title to the land in question; but it would seem that the decisions were not based on that ground alone, for it was intimated in the case of *Railway Co. v. McShane* that, so long as government had an interest in the land, either legal or equitable, the land was not taxable by the state. In that case it was contended by the state that, because the government had authorized the railway company to mortgage the lands, it had thereby parted with the legal title, and the land was, therefore, properly taxed by the state. But in answer to this proposition the court said:

“It is not necessary to go into the merely technical question whether the legal title passed from the United States by virtue of that mortgage and the act of congress which authorized it, nor whether, if it ever becomes necessary to foreclose that mortgage, the rights of the United States in the land would be divested by the proceeding, because we are satisfied that the United States, until she conveys them by patent or otherwise, has an interest, whether it be legal or equitable, which the state of Nebraska is not at liberty to divest by the exercise of the right of taxation.”

It appears in the railroad cases hereinbefore mentioned that the really substantial interest of the government in the lands sought to be taxed consisted in its right to withhold the patent from the railway company, as a means of securing the payment of the expenses incurred in surveying the lands; and the fact that the legal title to the granted lands was not in the railroad company, but in the

United States, does not seem to us, in view of the language we have quoted from the opinion in the *Prescott Case*, to have been the determinant factor in the decision of the question before the court. In the *Prescott Case*, as we have seen, it was announced as the established doctrine of the court that lands may be legally taxed before the issuance of the government patent in cases "where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right." But it does not necessarily follow that lands are subject to state taxation merely by reason of the fact that they have been conveyed by the government, or with its consent, to a purchaser. That this is true is shown, we think, in the case of *The New York Indians*, 5 Wall. 761. In that case the legal title to lands of the reservation had been conveyed by the Indians who owned them, with the consent of the United States, to certain parties, who were entitled to purchase them. The Indians retained the right to possession for the period of five years after the sale. The government had no pecuniary or proprietary interest in the land, but it had in the treaty stipulated with the Indians that they should own the land until they should choose to sell it. A tax was levied on the land and made subject to this right of possession of the Indians, but the land itself was sold in default of payment of the tax. Upon this state of facts the tax was held to be premature and void. In *McCulloch v. Maryland*, 4 Wheat. 316, the broad doctrine was announced, in substance, that neither the property of the federal government nor any of the instrumentalities employed by it in the execution of its lawful powers and duties may be taxed by the states; and the rule there laid down has never, so far as we are advised, been departed from. One question before the

April, 1901] Opinion of the Court—ANDERS, J.

court in that case was whether the state of Maryland had the right, under the constitution of the United States, to tax the Bank of the United States, which was incorporated under and by virtue of an act of congress. The government did not own the bank, but employed it as a means of executing one of its constitutional powers; and the court, after a most thorough consideration of the question, held that the levying of the tax on the bank, or, rather, one of its branches, was an illegal interference with the right of the national government to exercise a power vested in it by a constitutional act of congress, and that the tax was therefore void.

Applying the doctrine announced in the decisions of the supreme court of the United States to the case at bar, it would seem reasonably clear that the lands in question cannot be taxed by the state so long as the government has an interest in them, "either legal or equitable," or is even charged with the performance of some obligation or duty respecting them. That the government had an interest in these lands at the time the tax complained of was levied is apparent from the fact that the deeds were not to operate as a complete conveyance until appellant paid the full purchase price of the lands, and the further fact that under the said act of 1893 the deferred payments were secured "by vendor's lien upon the property." It became the duty of the government, under the law and the treaty, to receive and disburse these payments for the benefit of the Indians, and it is manifest that, if the lands should be sold for taxes before the deferred payments are made, its lien would be destroyed, and its power to collect the money defeated. It is true that possessory rights to public lands may be taxed by authority of the legislature (*Central Pacific R. R. Co. v. Nevada, supra*), and under our statute improvements on land whose title

We are satisfied that the complaint states a cause of action, and the judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer.

[No. 3706. Decided April 23, 1901.]

ADVERSE POSSESSION — WHAT CONSTITUTES.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

Martin & Grant and *Wright & Wright*, for respondent.

REAVIS, C. J.—Action in ejectment. The action was commenced against the tenant in possession, Hendron, but the appellant was substituted as defendant by order of the court. The defendant in his answer disclaims any

April, 1901.] Opinion of the Court—REAVIS, C. J.

interest in the premises demanded, except a small strip of land containing fifteen or twenty acres, and claims title to such strip by adverse possession for a period of more than ten years. The title to this strip of land was the only question in issue. At the conclusion of the testimony the court discharged the jury and found the facts, to which finding of facts no exception was taken by either party. The facts were, in substance, that the land in dispute is a narrow strip of fifteen or twenty acres extending along the entire eastern portion of section 1, township 26 N., of range 36 E., W. M., Lincoln county; that east of a certain fence, and immediately east of section 1 is section 6, township 26, range 37, same meridian; that there is now, and has been since 1880, a county road running in a northerly and southerly direction across the entire eastern portion of section 1, and on the east side of this road there is, and has been since 1885, a rail fence which forms the westerly boundary line of the strip of land in controversy; that in 1880 defendant Ledgerwood filed upon lots 4, 5, 6 and 7, in section 6, as a homestead, which land is immediately east of and adjacent to the tract of land in dispute; that Ledgerwood immediately settled upon, and made his residence and home upon, the premises including the tract in dispute, and that in 1885 he built and constructed the fence above mentioned, which fence was then, and is now, the western boundary of the line in dispute; that, at the time of building the fence, Ledgerwood believed that the same constituted the western boundary line limit of his homestead; that there is not now, and never has been since 1880, any other fence or division line between sections 1 and 6; that in 1887 Ledgerwood received patent for his homestead, which was duly recorded in the auditor's office; that in 1881, he broke, ploughed, and cultivated the

tract of land in dispute, to the fence; that in 1888 he constructed a dwelling house of the value of \$400, which house has at all times been occupied by him and his father and mother and tenant, until the commencement of this suit; that in 1886 defendant planted an orchard upon the tract in dispute, the trees being planted as near as ten feet to the fence, and he had also put other improvements on said tract, consisting of a barn and outbuildings and a well; that section 1, which includes the tract of land in dispute, was part of the grant to the Northern Pacific Railroad Company under the act of congress of July 2, 1864, and that the map of definite location of the railroad was filed in the general land office on October 4, 1880; that on the 24th of October, 1895, a patent was issued to the railroad company for said section 1; that on the 15th of September, 1898, plaintiff, in consideration of \$159.63, to be paid in five years, by contract purchased lots 1 and 2 on the south one-half of the northeast one-fourth and the southeast one-fourth of said section 1 from the railroad company; that at the time of such purchase plaintiff knew that a portion of the land so purchased was east of the fence, and that the same was in the possession of and claimed by the defendant, and that plaintiff had been a resident near this land for a number of years, and knew of the improvements upon the tract in dispute, and upon which defendant was living; that on the 18th of March, 1899, the plaintiff demanded possession of the tract of land in dispute. Upon such findings, the superior court adjudged the tract in dispute to the plaintiff.

It will be observed there is no controversy as to continued, uninterrupted occupancy by the defendant of the tract in controversy for a period of more than ten years; and the facts certainly establish that the claim and domin-

April, 1901.] Opinion of the Court—REAVIS, C. J.

ion of defendant over the tract was exclusive and inconsistent with any other theory than the claim of ownership, and entitled the defendant to recover in this action, unless we admit the contention urged by counsel for respondent—that the unintentional inclosure or use of a strip of land owned by another and lying next to the boundary, the location of which is not clearly known, will not constitute adverse possession. Counsel have industriously cited a number of authorities in which general expressions apparently sustain their contention. Among those which are most pertinent are *Preble v. Maine Central R. R. Co.*, 85 Me. 260 (27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366); *Krider v. Milner*, 99 Mo. 145 (12 S. W. 461, 17 Am. St. Rep. 549); *East Tennessee Iron & Coal Co. v. Ferguson's Heirs* (Tenn.), 35 S. W. 900; *Schleicher v. Gatlin*, 85 Tex. 270 (20 S. W. 120); *Worcester v. Lord*, 56 Me. 265 (96 Am. Dec. 456). In *McAuliff v. Parker*, 10 Wash. 141 (38 Pac. 744), the court observed:

“All the authorities hold that the question of adverse possession is a question of fact, and it must be a possession that is known to the owner of the legal title.”

In an authority cited in *Caufield v. Clark*, 17 Ore. 473 (21 Pac. 433; 11 Am. St. Rep. 845), is found, perhaps, a fair statement of the legal rule controlling title by adverse possession. The court said:

“If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a dis-seizure, but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse.”

The facts in the Oregon case are very similar to those in the present case. They were that the adverse claimant

there occupied and claimed title to the fence as originally located, which was not on the line described in the deed, although by mistake he supposed it was on such line. The court observed:

“We think, therefore, the fence has become the true boundary line of the adverse possession and that the plaintiff [claimant] is entitled to have the decree of the court below modified, so as to establish such line in accordance therewith.”

In *Grimm v. Curley*, 43 Cal. 250, the facts were also similar to those under consideration here. The plaintiff deraigned title by written conveyance to a city lot. Defendants entered upon a portion of the lot under deeds conveying to them portions of another and adjoining lot, and inclosed and improved a portion of the lot within the calls of plaintiff's conveyance for a period beyond the statute of limitations of California. It was ruled that the claim of title by adverse possession was good in defendants. The court observed:

“The action was commenced in June, 1869, and it appeared in proof that the defendants entered more than ten years before the commencement of the action, under deeds purporting to convey to them severally portions of lot numbered one thousand three hundred and eighty-one. It further appears that they entered upon the demanded premises in good faith, under the belief that said premises were a portion of lot number one thousand three hundred and eighty-one, and were included within their respective deeds. It also appears that from the time of their entry they have been in the continuous, open, notorious, and adverse possession, claiming to hold and own the same adversely to all persons whomsoever. A possession of this character comes fully within the definition of an adverse possession, as established by an unbroken current of authorities.”

See, also, *Levy v. Yerga*, 25 Neb. 764 (41 N. W. 773,

April, 1901.] Opinion of the Court—REAVIS, C. J.

13 Am. St. Rep. 525); Am. & Eng. Enc. Law, 248; *Cole v. Parker*, 70 Mo. 372.

As heretofore observed by this court, the question of adverse possession is one of fact; and, though the fence may have been established originally by mistake, if it were followed by a claim to the land and such acts as clearly evinced a determination of permanent proprietorship, the claim is established. The intention of the party claiming adverse possession, and also the notice of such claim to the real owner, must be inferred from the acts and declarations of the parties. In looking at the facts found by the superior court, the conclusion seems to be almost irresistible that the defendant,—a farmer who settled upon his homestead in 1880, and lived thereon and improved the same thereafter, certainly as early as 1885, when he placed a substantial dwelling house thereon, and barn and out-buildings, and dug a well and planted an orchard,—intended permanent proprietorship. He had cultivated the land since 1881. It would seem inconsistent with the ordinary conduct and intentions of men to say that these things were done without the claim of absolute dominion over this tract of land, or to conclude that it was not notice to the real owner. We therefore have arrived at a different conclusion from the superior court upon the facts found in the case, and conclude that the occupancy of the tract of land in dispute by the defendant was under a claim of right, and notorious and adverse to all other persons.

The judgment is reversed with direction to enter judgment for the defendant.

FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3122. Decided April 24, 1901.]

CHRISTIAN ANDERSON, *Appellant*, v. THE PROVIDENT LIFE
AND TRUST COMPANY *et al.*, *Respondents*.CREDITOR'S BILL — FRAUDULENT CONVEYANCES — ADEQUATE REMEDY
BY LAW.

The remedy by creditor's bill in equity to set aside fraudulent conveyances and subject real estate to sale free from any cloud occasioned by such conveyances is not abolished by the enactment of statutes in aid of executions on judgments at law, but the judgment creditor is entitled in such cases to maintain proceedings on the equitable side of the court, whenever his complaint shows that the relief which the law affords would not be full and adequate.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Reversed.

John A. Parker and *John C. Stallcup*, for appellant.

P. Tillinghast, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This is an action, in the nature of a creditors' bill, to set aside certain conveyances alleged to have been made in fraud of creditors, and to subject the real estate described in the complaint to the payment of a judgment. Briefly stated, the facts, as alleged in the complaint, are that John W. Sprague died on December 24, 1893, in Pierce county, Washington, leaving a will which was probated on December 29, 1893, and by which Otis Sprague and James R. Hayden were appointed executors; that at the time of his death the said John W. Sprague was the owner in fee of three certain parcels of real estate, all of which are specifically described, situated in said Pierce county, of the value of \$300,000, and money and personal property of the value of about \$60,000, all of which money

April, 1901.] Opinion of the Court—ANDERS, J.

and personal property has been applied by the executors in payment of debts and legacies, which debts and legacies together did not exceed the sum of \$60,000; that the said Otis Sprague is a son of the said decedent, and to him was devised by the will an undivided one-fourth interest in and to all the real estate owned by the said John W. Sprague at the time of his death, and that the said Otis Sprague on the 24th day of December, 1893, became the owner in fee of an undivided one-fourth of all of said real estate; that the will provided that the real estate might be sold if necessary for the purpose of paying the debts of the testator; that on January 24, 1894, judgment was recovered by the Tacoma National Bank, in the superior court of Pierce county, against the said Otis Sprague for the sum of \$4,730, which judgment upon its entry became a lien upon certain of the real property belonging to said Otis Sprague, and which is particularly described in the complaint, and that no transfer of the interest of said Otis Sprague in the property devised to him by the said decedent, or incumbrance thereon, had been made by him prior to the giving of said judgment and the existence of said judgment lien; that the judgment was duly assigned to the plaintiff on November 15, 1897, and that executions were issued thereon and returned wholly unsatisfied, and that no part of said judgment has been paid; that the executors on August 21, 1894, executed a deed to Charles Sprague, a son of the decedent, and one of the devisees named in the will, purporting to convey to him a portion of the real estate in question for the consideration of \$120,000, with the understanding between the said executors, the said Charles Sprague, and the defendant the Provident Life & Trust Company that Charles Sprague would execute to said company a mortgage on the premises for \$55,000, and turn the money so received over to the executors,

and then reconvey the estate so incumbered to said executors, and that the said agreement was accordingly carried out and performed; that on September 5, 1895, upon a similar agreement and understanding with the said Charles Sprague and the Provident Life & Trust Company, said executors executed a deed purporting to convey to said Charles Sprague another portion of said real estate, expressing a consideration of \$90,000, which real estate was mortgaged by said grantee to said Provident Life & Trust Company for \$30,000, and then conveyed to said executors, and that both of said deeds and mortgages were recorded in the office of the county auditor of Pierce county; that said executors had no right, power, or authority to incumber said real estate, nor any of the real estate of the deceased, or to mortgage the same; that Charles Sprague paid no consideration for the premises described in said deeds; that the defendant company took said mortgages from said Charles Sprague with full knowledge of the facts, and consented to and advised the doing of said acts, and that the whole transaction was a fraudulent scheme to dispose of Otis Sprague's interest in said premises, and thereby to prevent the collection of plaintiff's judgment and defeat the lien thereof; that the said grantors had no right or authority, under the terms and provisions of the will, to make said deeds, and the same were not made under the order of court, or in the course of administration of said estate, or pursuant to any power contained in the will, nor for the purpose of settling the estate of the deceased, nor under any order of distribution thereof; that the said sales of real estate were not necessary to the payment of debts of the estate or legacies, nor was any considerable portion of the proceeds of said sales and mortgages used for such purposes, and that the same were made for the purpose of enabling the said Otis Sprague to defraud his creditors,

April, 1901.] Opinion of the Court—ANDERS, J.

and particularly the plaintiff herein; that in pursuance of some subsequent secret arrangement, not disclosed on the county records and not known to the plaintiff, the property described in said two deeds and mortgages was, prior to the commencement of this action, turned over to the defendant Provident Life & Trust Company, and ever since has been, and now is, held by said company under a claim of full ownership thereof; that said premises are yielding a rental of about \$700 per month, and the same is being collected by said company, and all right of lien by reason of plaintiff's judgment is denied by said defendant; that by reason of the said conveyances and the said mortgages and said secret arrangement, and the said claim of title to said premises and possession thereof by said defendant company, the plaintiff is obstructed in the enforcement of his lien and the payment of his judgment; that there is no property out of which to make payment of plaintiff's judgment, other than that covered by said deeds and mortgages, and described in the complaint herein; that the executors, and especially Otis Sprague, are insolvent and without property of any kind, except the premises claimed and possessed by the defendant Provident Life & Trust Company; that Otis Sprague has been insolvent ever since the rendition of plaintiff's judgment, and that execution was not issued on said judgment prior to the year 1895 because the executors had possession and control of said premises, and were entitled to one year's time within which to pay the debts and distribute the property of the estate; that at the time this action was commenced the said executors and the defendant Provident Life & Trust Company, with intent to further obstruct and defeat the collection of plaintiff's judgment, were colluding together to sell and convey the premises to an innocent purchaser, who, without knowledge

of the fraudulent designs and purposes thereby intended, might buy the premises believing that he would get a clear title thereto, because of certain provisions in the will empowering the executors to sell property of the estate for the payment of debts and legacies, in that a *lis pendens* was filed by plaintiff, giving notice of the commencement of this action, and describing the property involved and the lien claimed by plaintiff as set forth in his complaint; that subsequently to the return of the unsatisfied execution the plaintiff caused another execution to be issued and levied upon the property in controversy, and the same was advertised for sale by the sheriff, whereupon the defendant the Provident Life & Trust Company applied to the federal court for an injunction against this plaintiff, alleging that it was the absolute owner of the said real estate, and upon the prayer of said company an injunction was issued restraining the sheriff and this plaintiff from selling said property on said execution; that the said superior court had theretofore acquired jurisdiction over the subject-matter of this action and the parties thereto; that the said estate and the said executors are under the control of the said superior court, and subject to its orders, to the extent of administering their trust with just regard to the rights of all parties interested in the assets of said estate, the said federal court being without jurisdiction in said matters; that by reason of the conditions alleged the said one-fourth interest in said real estate will not sell for anything near its value, and but for a small portion of plaintiff's judgment, unless before such sale the lien of plaintiff is adjudged valid, and that if said lien be adjudged valid the said one-fourth of said premises will sell for much more than if sold under the present conditions; and that by reason of unpaid taxes, and the taxes accruing upon the said premises, and the depressed condition of values

April, 1901.] Opinion of the Court—ANDERS, J.

of property in Tacoma, the said one-fourth interest will not sell for sufficient to fully pay plaintiff's judgment, interest, and costs, and it is necessary that one-fourth of the rents of said premises be brought into court and preserved for that purpose. To this complaint the Provident Life & Trust Company interposed a demurrer upon the ground that it failed to state facts sufficient to constitute a cause of action against said defendant, which demurrer was sustained by the court. The plaintiff elected to stand upon his complaint, and refused to further plead; and thereupon the court dismissed his action, and gave judgment against him for defendant's costs and disbursements. The plaintiff appeals.

The sole question for determination is, as we have seen, whether the complaint, upon its face, states facts sufficient to entitle the appellant to equitable relief. It is asserted in the brief of the appellant that the court below sustained the demurrer to the complaint for the reason that, in its opinion, creditors' bills have been abolished in this state by force of our statutes in aid of executions on judgments at law. This statement is disputed by the learned counsel for the respondent, who claims that the demurrer was sustained because it appeared from the allegations of the complaint that appellant had an adequate remedy at law, and therefore did not need the aid of equity. The record does not disclose upon which, if either, of these theories the learned court acted, but we are of the opinion that the judgment cannot be sustained upon either of the grounds suggested by counsel. This court has repeatedly entertained actions to set aside fraudulent conveyances, and subject property so conveyed to the satisfaction of judgments, and this is conceded by counsel for the respondents. Nor does the fact that a party may have a remedy at law necessarily preclude him from invoking the aid of

equity in cases of this character. If the legal remedy is inadequate to afford full relief, resort may be had to equity in proper cases. Indeed, it is a well-established principle that equity has concurrent jurisdiction with law over frauds, under statutes relative to fraudulent conveyances. Wait, *Fraudulent Conveyances* (3d ed.), § 51; Bump, *Fraudulent Conveyances* (4th ed.), § 530. And the creditor himself may select the forum in which the question of fraud shall be determined, or, in other words, he has the option to submit the determination of the question either to a court of law or a court of equity.

“But,” says Mr. Bump, “the remedy most frequently used is a bill in equity, because a court of equity sifts the consciences of the parties and removes the cloud from the title. Fraud constitutes the most ancient foundation of its jurisdiction, and is a sufficient ground for its interposition. It may grant relief, although there is ample remedy at law; for no relief is adequate except that which removes the fraudulent title. The relief in equity is different and may be more beneficial than that given by the law.” Bump, *Fraudulent Conveyances* (4th ed.), p. 532.

And in Wait on *Fraudulent Conveyances* it is stated that

“The existence of a remedy at law does not interfere with the right of a creditor to resort to a court of equity to secure a cancellation of a fraudulent conveyance, as an obstacle in the way of the full enforcement of a judgment, and a cloud on the title to the property sought to be reached . . . The creditors’ bill, or a suit to clear the fraudulent transfer, is, for many reasons, entitled to preference as a means of relief. Should the creditor attempt to sell the disputed property arbitrarily under execution, bidders would be deterred from purchasing, lest they should buy a lawsuit; hence the market value of the land embraced in the covinous transfer is practically destroyed. Then the seizure of the property subjects the creditor to the peril incident to proving that the transfer

was fraudulent, and, in the event of failure to establish fraud, of paying damages for the unwarrantable interference, seizure, and sale." Wait, *Fraudulent Conveyances* (3d ed.), § 60.

In 5 Enc. Pl. & Pr. p. 402, the writer observes:

"The remedy of the judgment creditor by a sale under execution of the premises fraudulently conveyed does not affect the jurisdiction of equity, as the creditor has the right not only to have the property subjected to the payment of his judgment, but to have it done in such a manner that it will bring its fair market value."

And on page 392 of the same volume it is said that "the most common instance of a creditors' bill is where property legally liable to execution has been fraudulently conveyed or incumbered, so that, although the property might still be sold on execution, it would not sell for an adequate price, and a suit is brought to clear away such conveyance or incumbrance." The law as laid down by these text writers is in accordance with the overwhelming weight of authority. In fact, no decisions announcing a contrary doctrine have been cited by counsel, and we have observed none. In *Cornell v. Radway*, 22 Wis. 260, the court said:

"The existence of the [judgment] lien, without adequate remedy for enforcing it at law, by reason of the fraudulent or inequitable obstruction interposed by the defendant, is sufficient to give a court of equity jurisdiction."

And in *Zoll v. Soper*, 75 Mo. 460, which was an action to subject land to the payment of a judgment, it was held that, "while the creditor might have the land sold on execution, equity will not compel him to pursue that ruinous course." See, also, *Freeman, Judgments* (4th ed.), § 350; *Pomeroy, Equity Jurisprudence* (2d ed.), § 1415, and note; *Black, Judgments*, § 423; *Metzger v. Bur-*

STROHL v. SEATTLE NATIONAL BANK.

Syllabus.

[25 Wash.

nett, 5 Kan. App. 374 (47 Pac. 599); 4 Am. & Eng. Enc. Law, 576; *O'Connell v. Taney*, 16 Colo. 353 (27 Pac. 888, 25 Am. St. Rep. 275). While it is true that the appellant, if he had been permitted to do so, might have sold the premises in controversy on execution in the first instance, it is equally true, under the authorities above cited, that he was not obliged to pursue that course. He had the right, under the averments of the complaint, which are admitted to be true by the demurrer, to proceed in equity to have the obstructions in the way of execution removed. We are convinced that the complaint, viewed in the light of the authorities, states a cause of action; and the judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 3376. Decided April 24, 1901.]

WELLINGTON STROHL, *as Receiver, Appellant*, v. SEATTLE NATIONAL BANK *et al.*, *Respondents*.

CORPORATIONS — INSOLVENCY — FRAUDULENT PREFERENCE OF CREDITORS.

Where, at the time of the execution of a mortgage by a corporation to secure its indebtedness to one of its creditors, the total indebtedness of the corporation did not exceed sixty-six per cent of a conservative valuation of the corporate assets, and the corporation, at the date of the execution of the mortgage, was doing business, with its affairs in equally as good condition as at any time during its existence, and with every indication of their continuance in the same condition, and it in fact continued to do business for several months thereafter, when it finally became insolvent, such mortgage will not be set aside at the suit of a receiver, on the ground of its being a fraudulent preference by an insolvent corporation.

Appeal from Superior Court, King County.—Hon. JOHN H. POWELL, Special Judge. Affirmed.

April, 1901.]

Opinion Per Curiam.

Ira Bronson and James B. Howe, for appellant.

Bausman, Kelleher & Emory and Strudwick & Peters,
for respondents.

PER CURIAM.—This cause is appealed from the superior court of King county. On the 19th day of December, 1898, the plaintiff in the action, appellant here, was duly appointed by said court as receiver of the Skookum Box & Lumber Company, a corporation. He thereafter duly qualified as such receiver, and ever since has been, and now is, such receiver. The said company had theretofore owned and operated two manufacturing plants; one at South Bend, Washington, and one at Seattle, Washington. The plant at South Bend was largely confined to the manufacture of lumber for use in making boxes, and the one at Seattle was chiefly used for manufacturing boxes. On the 9th day of July, 1898, said company executed to one H. W. Castleman a chattel mortgage upon the said manufacturing plants and other property of said company to secure the payment of three promissory notes for money theretofore loaned and advanced by said Castleman to said company, as follows: One note dated November 23, 1897, for \$1,000; one dated December 31, 1897, for \$948.40, and one for \$3,794.09, dated June 28, 1898,—all of the notes being payable on demand. It was agreed between the parties to said mortgage that the mortgagee would forbear bringing suit upon said notes and mortgage for a period of ninety days. Soon thereafter said notes and mortgage were duly transferred, for a valuable consideration, to the respondent Seattle National Bank, and after the expiration of three months, the debts secured by said mortgage not having been paid, said bank instituted suit in the superior court of King county for the purpose of obtaining a decree foreclosing said mort-

gage. In December, 1898, such decree was obtained, and an order of sale was issued thereunder directing the sale of the mortgaged property both in King and Pacific counties. Meanwhile one Gregory Ellsworth had obtained a judgment against said Skookum Box & Lumber Company in foreclosure of certain laborers' liens amounting to \$589 and costs, and had caused writs to be issued and levied against the property of said corporation, and was seeking to enforce said judgment as a preferred claim against said property. Thereupon the appellant, who had meantime been appointed receiver, as aforesaid, instituted this action, and he alleges in his complaint that the said corporation was insolvent at the time the said notes and mortgage were executed, and asks that all the respondents, viz., the holders of the said judgments and the sheriffs of King and Pacific counties, respectively, shall be enjoined from proceeding further with said sales, and that the said sheriffs be commanded to deliver to said receiver all the property, goods, and effects in their possession belonging to said Skookum Box & Lumber Company. The prayer of the complaint further asks that the said mortgage be declared and held to be in fraud of the creditors of said corporation, and that the same be set aside and held for naught as a preferred claim or lien upon the assets of the corporation. The insolvency of the corporation was denied by the respondents. A trial was had before the court, and, after hearing the evidence, the court found, in substance, that said Skookum Box & Lumber Company was organized as a manufacturing and mercantile corporation under the laws of this state in the month of August, 1897, its chief purpose being the manufacture and sale of lumber, particularly boxes, and that it was so engaged continuously from its organization to about the 19th day of November, 1898; that during said period of continuous opera-

April, 1901.]

Opinion Per Curiam.

tion of its business it did not at all times meet its obligations promptly as they matured, but this was due in large part to the investment of its profits in improvement of its plants; that in July, 1898, the conservative value of its two plants was \$13,000 or \$14,000, free and unincumbered; that it had other assets at said time, consisting of accounts receivable, which were good, of lumber and stock in Seattle and at South Bend, to the amount of at least \$3,330.50; that the total amount of its indebtedness, including that afterwards included in said mortgage, was \$11,000; that said Castleman was the president of said corporation continuously from its organization up to the 21st day of July, 1898, was the holder and owner of a large portion of its stock, and from February, 1898, to July 21 of the same year, was the owner of one hundred and forty-four shares of a total of two hundred shares of stock; that from time to time from its organization up to the 28th day of June, 1898, the said Castleman had advanced and loaned to said corporation sums of money in the aggregate of \$5,096.48, for which he held demand notes of said corporation payable to his order, which said advances were made by him to the corporation as a banking loan, or the advance of additional capital on his part; that on the 9th day of July, 1898, said Castleman, being pressed by a creditor of his own for payment, requested of said corporation security for its indebtedness to himself, that he might use the same wherefrom to pay the said creditor, and thereupon the mortgage aforesaid was executed by said corporation, covering its plants in Seattle and South Bend, excluding lumber and stock on hand, book accounts, and a horse and wagon belonging to the company,—said Castleman agreeing at the time to forbear any suit upon the notes or mortgage for ninety days; that the mortgage was duly acknowledged, verified with proper affidavit, recorded, and

on or about July 9, 1898, assigned, together with the mortgage indebtedness, to the respondent Seattle National Bank; that the mortgage was in truth and in fact given by said company and received by said Castleman in good faith, and without any intention on the part of any one to hinder, delay, and defraud any of the creditors of said company, and the assignment was made by said Castleman and accepted by said bank in good faith and without any such intention; that, although at the time of the execution of said mortgage the corporation did not have on hand ready money sufficient to pay said mortgage debt in full, yet its business and affairs were in equally as good condition as at any time during its course of business. It was doing business, was a going concern, was solvent, and there was every reason to anticipate the continuance of its business under such condition; that on or about the 21st day of July, 1898, for a valuable consideration, said Castleman sold, assigned, and set over to the respondent C. E. Vilas (substituted also as defendant and respondent for Gregory Ellsworth, whose assignee he was) the balance due on said notes and mortgage in the hands of the Seattle National Bank after the payment of the bank claim, and requested the said bank in writing to recognize such assignment, which was by the bank duly accepted; and at the same time said Vilas, for a valuable consideration, became the owner of all of said Castleman's interest in the stock of said Skookum Box & Lumber Company. Other facts are set forth in the record as found by the court, but we do not deem them of sufficient materiality to be set forth here. Based upon the material facts as hereinbefore set forth, the court entered the following conclusions of law:

"1. That the notes and mortgage made by the Skookum Box & Lumber Company to H. W. Castleman, in the hands of the Seattle National Bank for its own interest and as

April, 1901.]

Opinion Per Curiam.

trustee of defendant C. E. Vilas, for the balance and the judgment based thereon herein sought to be set aside and enjoined, were and are a valid and subsisting debt of said company, and lien upon the property in said mortgage described, and prior to any rights or claim therein on the part of the receiver, Wellington Strohl.

"2. That at the time of the execution of said mortgage and the notes thereby secured, the said corporation was solvent and a going concern.

"3. That the judgment of the defendant Gregory Ellsworth is a valid and subsisting lien upon all of the Seattle plant, factory, and property of the Skookum Box & Lumber Company as against the receiver and the creditors represented by him."

Decree was entered in accordance with the foregoing conclusions of law, and from such decree the receiver has appealed.

The material question for our consideration is, Did the court properly find the facts upon the evidence submitted? A careful examination and analysis of the evidence leads us to the same conclusion as that of the trial court. It is true, the mortgagee was the president of said corporation and was the holder of a large amount of stock therein, but there is no doubt under the evidence that the corporation owed him the amount represented by the notes for cash loaned and advanced, and which was used to enlarge and improve its plants and carry on its business. Transactions of this character between a corporation and its officers call for the most careful examination and searching scrutiny. We are, however, unable to discover anything in this record that indicates want of good faith on the part of any one concerned. The money was received by the corporation, and its plant and assets were increased to the amount thereof. Such a debt can be secured by the mortgage of a corporation unless such corporation at the time

the mortgage is executed be insolvent or in imminent danger of insolvency. The evidence in this case shows that when this mortgage was executed the corporation was a going concern, was doing as good a business as it had ever done during its existence, had for some months been doing a business of from \$3,000 to \$4,000 a month, and continued for months afterwards in the regular and ordinary conduct of its business. It is, we think, clear from the evidence that when this mortgage was executed the company's anticipations were really more assured than they had ever been before. The salmon-canning season was just opening, a number of good orders for boxes had already been placed with the company, and others were in prospect. The company was organized near the close of the salmon-canning season of 1897. The season of 1898 was the first full season since its organization, and the demand for the product of its manufacture was good. On July 22, 1898,—just thirteen days after the execution of the mortgage in question,—said Castleman, who was then president of the company, sold his stock and retired from the active management of the company, which he had theretofore supervised from the time of its organization. He was succeeded by the aforesaid Vilas, who shows by his own testimony that he did not give the business of the company proper attention, but left the superintendent of the mechanical and manufacturing department in charge, not only of the details of manufacture, but of the financial part of the company's business as well. We believe the evidence shows that a continuance of the same methods of management which were observed by the company at the time the mortgage was made would have saved it the embarrassment which overtook it a few months later. As it was, its business continued for months afterwards, and other creditors continued to extend credit, not-

April, 1901.]

Opinion Per Curiam.

withstanding the existence of this mortgage, the record of which was due notice to all of that much, at least, of its indebtedness. The court's findings show that a conservative valuation of the company's assets at the time of the mortgage was \$5,000 in excess of its indebtedness, the indebtedness being about sixty-six per cent. of the conservative valuation of the assets. We think the evidence justifies this finding of the court.

Appellant's counsel contend that this case falls within the same rules as the following cases: *Thompson v. Huron Lumber Co.*, 4 Wash. 600 (30 Pac. 741); *Conover v. Hull*, 10 Wash. 673 (39 Pac. 166, 45 Am. St. Rep. 810); *Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co.*, 16 Wash. 681 (48 Pac. 407). We think not. In the case of *Thompson v. Huron Lumber Co.*, *supra*, the court uses this language:

"When it has reached a point where its debts are equal to or greater than its property, and it cannot pay in the ordinary course, and its business is no longer profitable, it ought to be wound up and its assets distributed."

Such conditions are not shown to have existed in this case when the mortgage was made. In *Conover v. Hull*, *supra*, the court found that, although the nominal value of the assets, including book accounts and bills receivable, was greater than the liabilities, yet the actual value was much less. Such is not the condition found by the trial court in this case; but, upon the contrary it appears that a conservative estimate makes the sum of the indebtedness only about two-thirds of the amount of the assets. In *Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co.*, *supra*, the court found that for some time the corporation had been unable to operate its works and plant, and that they were idle; that the corporation was insolvent, and that its officers

knew it was insolvent, at the time the mortgages were executed.

We believe the trial court was right in adjudging this to be a valid mortgage at the time of its execution. If valid then, it remained so, notwithstanding the corporation may have drifted into insolvency some months afterwards.

The judgment is therefore affirmed.

[No. 3742. Decided April 24, 1901.]

FRANCIS B. MUHLENBERG, *Appellant*, v. CITY OF TACOMA *et al.*, *Defendants*, S. R. BALKWILL, *Respondent*.

PLEDGES — FORECLOSURE — PARTIES — RIGHT OF INTERVENTION.

Under Bal. Code, § 4846, which provides that "any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either party, or an interest against both," the receiver of an insolvent bank is entitled to intervene in an action by the trustee of a pledgee of such insolvent bank, instituted for the purpose of establishing the validity of certain city warrants, which were the subject of the pledge, and which, the receiver claims, had been fraudulently and collusively sold by the pledgee to itself; and the fact that the bank, or its receiver, has another legal remedy for the enforcement of its claims is immaterial, under the terms of said statute.

SAME — TENDER OF INDEBTEDNESS.

Where a pledgor intervenes in an action brought by the pledgee to enforce collection of the collaterals which were the subject of pledge, tender of payment of the amount due from the pledgor is unnecessary, when it does not seek to regain possession of the pledged property, but merely to have the validity of its title adjudged as against the plaintiff and defendant in the action.

SAME — LACHES.

The fact that the receiver of an insolvent pledgor of collaterals which had been fraudulently sold by the pledgee to itself

April, 1901.] Opinion of the Court—WHITE, J.

made no move to have the sale declared invalid, until his intervention some two years later in an action brought by the pledgee as absolute owner to enforce payment of the collaterals, would not constitute him guilty of laches, when it appears that the pledgee had filed its claim for the debt with him as receiver and never modified same, that the president of the pledgee bank had admitted to the receiver's attorney a year after the alleged sale that they would be satisfied with their claim and interest, that in all the correspondence between the receiver and pledgee the former always treated the collaterals as still in pledge, and the pledgee had made no opposition thereto nor set up any claim of title adverse to the receiver, until a short time prior to the suit, in which the receiver promptly intervened for the purpose of having the sale set aside and the holder of the collaterals declared a trustee charged with the payment to the receiver of any surplus in the proceeds of the collaterals after the satisfaction of the pledgor's indebtedness to the pledgee.

SAME — PURCHASE BY PLEDGEE — WHEN SALE INVALID.

Where the pledgee of collaterals, for the purpose of acquiring title thereto for its own advantage, and not for the purpose of liquidating the pledgor's indebtedness, procures a sale of the pledged property to itself, knowing that the pledgor had no other means of satisfying its claim, and that the collateral had no market value, but under certain contingencies would be worth twice the amount of the debt it was given to secure, the sale is invalid.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

John A. Shackelford, for appellant.

John D. Fletcher, for respondent.

The opinion of the court was delivered by

WHITE, J.—The original action in which this intervention was filed was begun May 27, 1898, by Francis B. Muhlenberg against the city of Tacoma and its treasurer. A large number of warrants were assigned to Muhlenberg for the purpose of enabling him to bring the action. In his complaint he asked that the warrants held by him be declared to be valid obligations of the city of Tacoma,

and that the city and its treasurer be enjoined from using the revenues of the city arising from taxes, licenses, and fines for payment of debts of the city contracted since the issuance of the warrants held by him. The defendants answered that the warrants held by the plaintiff had been paid, and that they were void. On June 15, 1898, S. R. Balkwill, receiver of the German-American Safe Deposit & Savings Bank, procured leave and filed a complaint in intervention. This intervening complaint alleged that on October 31, 1895, the German-American Safe Deposit & Savings Bank was the owner of about \$30,000 of Tacoma city warrants, and that it then pledged said warrants to the Independence National Bank of Philadelphia as security for an indebtedness of \$18,000; that the Independence National Bank filed a creditor's claim with the intervenor, as receiver, for \$18,229.46, which claim was allowed; that the Independence National Bank claimed to be the owner of the warrants, and refused to recognize any interest of the intervenor in them; and that the Independence National Bank had assigned the warrants to the plaintiff for the sole purpose of maintaining this action. The prayer was that the intervenor might be declared the owner of the warrants, and subrogated to all the rights of plaintiff in the action; and the remainder of the prayer was the same as the one contained in the plaintiff's complaint. On October 26, 1899, the intervenor filed an amended intervening complaint. The first paragraph of the amended intervening complaint sets forth the appointment of the intervenor as receiver of the German-American Safe Deposit & Savings Bank. The second paragraph alleges leave to intervene in this cause and leave to amend the complaint in intervention. The third paragraph alleges that the Independence National Bank is a corporation. The remaining paragraphs are as follows: That

April, 1901.] Opinion of the Court—WHITE, J.

on or about the 25th day of April, A. D. 1894, said German-American Safe Deposit & Savings Bank borrowed of said Independence National Bank of Philadelphia the sum of \$25,000, and to secure payment of said sum deposited city warrants of the city of Tacoma, Pierce county, Washington, of the face value of about \$30,000. That payments were made upon said loan from time to time by said German-American Safe Deposit & Savings Bank, so that the amount still remaining unpaid on said loan, at the time the receiver was appointed over said German-American Safe Deposit & Savings Bank, was the sum of \$18,000. At the time the receiver was appointed as aforesaid, the city of Tacoma was denying and disputing the validity of a large number of outstanding city warrants, and, among others, the said warrants so held by said Independence National Bank of Philadelphia as collateral, and was refusing to pay any of said warrants, on the ground that the same had once been paid and were invalid. That immediately thereafter the said Independence National Bank requested, instigated, and induced the intervenor to go to great trouble and expense to procure an adjudication in the courts that the warrants aforesaid, so held as collateral by said Independence National Bank, were valid, and had not been paid. And the intervenor, by reason of the instigation and inducement on the part of said Independence National Bank, and for the purpose of protecting the interest of his trust in said warrants, did go to great trouble and expense, and did, by himself and his employees, spend several months of time, and more than \$500 in money, in procuring information, and preparing evidence, and otherwise assisting the holders of said Tacoma city warrants in preparing their causes for trial; three of which causes were litigated through the supreme court of the state of Washington before the

validity of the said warrants so held as collateral was finally determined and adjudicated in favor of the warrant holders. And the said Independence National Bank never informed or notified the intervenor that it made any claim to be the absolute owner of said warrants, or that the intervenor's interest and equity therein had terminated, until after the intervenor had incurred said expense and spent said time and labor in establishing the validity of said warrants; and the intervenor was, during the progress of the litigation, and at all times until after the principal cause involving the validity of said warrants had been decided sustaining the validity of said warrants, permitted, allowed, and induced by said Independence National Bank of Philadelphia to believe, and did believe, that the trust which he represented had an equity and interest in and was the owner of, said warrants, subject only to the payment of said indebtedness for which the same had been pledged; that by reason of the foregoing the said Independence National Bank and the said plaintiff, as its representative, are now estopped, and ought not to be heard to claim that the intervenor is not the owner of said warrants so pledged as collateral as aforesaid. The intervenor further alleges: That the said Independence National Bank, on or about the 10th day of December, 1895, filed its claim with the intervenor against said German-American Safe Deposit & Savings Bank for the amount still unpaid upon said loan, with interest, making the total amount of said claim \$18,229.46; and that the intervenor, as receiver, approved and allowed said claim. That, at the time intervenor was appointed receiver, said German-American Safe Deposit & Savings Bank had no money whatsoever, and property of very little value, and that from the assets of said German-American Safe Deposit & Savings Bank, other than

April, 1901.] Opinion of the Court—WHITE, J.

the warrants held by said Independence National Bank of Philadelphia as collateral as aforesaid, it was impossible to realize more than the sum of \$1,000, which fact was at that time made known to said Independence National Bank of Philadelphia. That afterwards, to-wit, on or about the 9th day of September, 1899, the intervenor made and fully completed arrangements by which he could obtain money to pay off the amount remaining unpaid on said loan of said Independence National Bank of Philadelphia, and at once notified said Independence National Bank that he was ready and willing to pay said amount, and did then tender to it the full amount remaining unpaid upon its loan, principal and interest, and requested said Independence National Bank, upon such payment being made, to turn over to said receiver said warrants held by it as collateral as aforesaid. That thereupon said Independence National Bank refused, and ever since has refused, to accept such payment or to turn over the warrants, or any of them, held by it as collateral as aforesaid; and then made a claim, and still makes the claim, that the intervenor has no interest, equity, right, or claim in or to said warrants, or any part of them, but that it, the said Independence National Bank, has become the absolute owner of said warrants, under and by virtue of some pretended sale of said warrants made in the city of Philadelphia on or about the 23d day of April, 1896, at which said pretended sale the said Independence National Bank claims to have become the purchaser of all of said warrants, and by reason thereof to be now the absolute owner and holder of the same free and clear of any equity, interest, right, or claim of the said German-American Safe Deposit & Savings Bank or the intervenor. The intervenor further alleges: That notice of said sale was not given to him

prior to the time the same is claimed to have been made, and he had no prior notice thereof, to enable him to protect the interests of his said trust; and at no time subsequent to said pretended sale has the intervenor been notified or informed that any such sale had been made, or what amount, if any, was realized as the proceeds of said sale; and the Independence National Bank has never receipted to the intervenor for the proceeds of said sale, has never given him any credit therefor upon the claim so filed with the intervenor, and has never withdrawn, or in any manner changed or modified, said claim for \$18,229.46. That at the time said Independence National Bank claims to have made said sale of said warrants it and its officers well knew that the intervenor had no money in his said trust with which to pay off the amount of said loan, and well knew that the validity of said warrants was disputed by the city of Tacoma; that actions were pending to test their validity and enforce the payment of said disputed warrants of the city of Tacoma, including those held by it as collateral as aforesaid; and that, if the validity of said warrants should be established, the amount still unpaid upon its loan would be at once paid; that, if said warrants were held invalid, they would have no value whatsoever, and that no sale thereof could be made at any fair or reasonable price during the pendency of said litigation. And the said Independence National Bank in making said pretended sale, if any was made, did not act in good faith for the purpose of realizing money as the proceeds of such sale to apply upon the said debt from the intervenor's trust to said bank, but, on the contrary, acted fraudulently, and with the design and intent to injure the intervenor's said trust and the creditors of the German-American Safe Deposit & Savings Bank, by making a pretended and collusive sale of said

warrants to itself, or to its own officers, for the mere purpose of cutting off the rights, equities, and claims of the intervenor therein, and thereby hinder, delay, and defraud the creditors of the intervenor's said trust. That said plaintiff Francis B. Muhlenberg has no interest whatsoever in said warrants, but is merely a nominal party representing said Independence National Bank of Philadelphia. That it is impossible for the intervenor to give an accurate and exact list of said warrants, but all of the same are included in this action, and are the property of and belong to the intervenor. That the intervenor is now able, ready, and willing to pay and does tender to the said Independence National Bank of Philadelphia, and to plaintiff herein, as its representative, the full amount, principal and interest, still unpaid upon said loan, together with any and all legitimate expenses that they, or either of them, have been put to in protecting or caring for said collateral, upon proof of the same being submitted to this court in this cause. The intervenor prayed for a decree adjudging the sale of the warrants held as collateral to be fraudulent, collusive, and void, and that the intervenor be adjudged to be the owner of the warrants in controversy, subject to the payment of the indebtedness for which the same had been pledged, together with all legitimate expenses of the pledgee, and that the Independence National Bank and the plaintiff be required to deliver the warrants to the intervenor upon the payment of said indebtedness, together with the expenses; and that the intervenor be subrogated to all the rights of the plaintiff as to said warrants. The remainder of the prayer is in accordance with the prayer contained in plaintiff's complaint, and asks that the warrants be declared to be valid, and that the defendants be enjoined from using the moneys of the city to pay indebtedness ac-

cruing since the issuance of the warrants until the warrants shall have been fully paid. A demurrer to this amended complaint in intervention was filed on November 11, 1899. The grounds stated were that the court had no jurisdiction of the person of the plaintiff; that the court had no jurisdiction of the subject-matter of the action; that the intervenor had no legal capacity to sue; that there was a defect of parties plaintiff; that there was a defect of parties defendant; that several causes of action had been improperly united; that the complaint did not state facts sufficient to constitute a cause of action; that the action had not been commenced within the time limited by law; and that the complaint did not state facts sufficient to entitle the receiver to intervene in the cause. On the same day the demurrer was heard and an order entered overruling it. The answer of the plaintiff to the amended intervening complaint was filed on the 6th day of December, 1899. It denied a number of allegations contained in the intervening complaint, and by way of affirmative defense alleged that on the 23d day of April, 1896, the Independence National Bank caused the warrants in dispute, which it held as collateral, to be sold at public sale, and that the warrants were bought in for the Independence National Bank for the sum of \$5,000, which amount was credited upon the indebtedness of the pledgor; and the answer sets forth the written agreement of pledge in which the German-American Safe Deposit & Savings Bank waived any notice of sale, and consented that the pledgee might become a purchaser at the sale of the pledged property. The answer further alleged laches on the part of the receiver in attacking the sale of the collateral, and that he had waited until the collateral had risen greatly in value before taking any steps to set aside the sale of the collateral. The answer also alleges the

April, 1901.] Opinion of the Court—WHITE, J.

solvency of the Independence National Bank. The reply denies a portion of the allegations of the answer, and restates some of the allegations of the amended complaint in intervention.

The evidence was, in substance, as follows: About April 25, 1894, the German-American Safe Deposit & Savings Bank borrowed of the Independence National Bank of Philadelphia \$25,000, and to secure the payment thereof deposited city warrants of the city of Tacoma of the face value of about \$30,000. On June 8, 1895, the amount of the debt had been reduced to \$18,000, and on that day the German-American Safe Deposit & Savings Bank executed and delivered to the Independence National Bank a certificate of deposit for the sum of \$18,000 as a token of said indebtedness. This certificate was payable on demand. This certificate bore interest at six per cent. Upon the 8th day of August, 1895, the German-American Safe Deposit & Savings Bank delivered the following agreement to the Independence National Bank, to wit:

“We herewith deposit with the Independence National Bank of Philadelphia, as collateral on our certificate of deposit No. 181, dated June 8, 1895, for \$18,000, on demand, \$24,583.05, warrants of the city of Tacoma, Washington, which we hereby pledge, together with any that may be pledged hereafter, to secure this or any future obligations. Upon default of payment of said or any other certificate of deposit, we hereby authorize and empower the Independence National Bank of Philadelphia, for the purpose of liquidation of this certificate of deposit, and of all interests or costs thereon, to sell, transfer, and deliver the whole or any part of such security, or any additions thereto, or substitute therefor, without any previous demand, advertisement, or notice, either at brokers’ board or public or private sale, at any time or times thereafter, with the right on the part of such holder to become the

purchaser and absolute owner thereof, free of all trusts and claims.

German-American Safe Deposit & Savings Bank.

By A. J. Weisbach, Sec'y.

Tacoma, Wash., August 8, 1895."

By mistake the amount of warrants is recited in the agreement to be \$24,583.05 face value. The correct amount of warrants then held by the Independence National Bank and covered by the agreement was \$27,454.80. These warrants were all issued in 1894. Interest upon the certificate was paid to the 31st day of October, 1895. On November 6, 1895, S. R. Balkwill was appointed receiver of the German-American Safe Deposit & Savings Bank, and qualified as such. On November 20, 1895, the cashier of the Independence National Bank wrote to the receiver, saying:

"We beg to notify you that we wish payment made of a certificate of deposit we hold to the amount of \$18,000, of the German-American Safe Deposit & Savings Bank, secured by \$27,454.80 of Tacoma warrants. Unless this amount is paid, we beg to notify you that we will proceed to sell such collateral for the account above named."

On November 29th the receiver wrote a letter, saying, among other things:

"In answer to yours of the 20th, beg to say it is impossible to take up certificate of deposit, as we have no funds. All the cash we found on taking possession of the bank was one dollar and ten cents (\$1.10), and the fixtures there were of little or no value."

On December 10, 1895, the Independence National Bank sent to the receiver a statement of its claim against him. On January 30, 1896, in response to a telegram inquiring whether the receiver was making efforts to secure payment of the warrants, he answered:

April, 1901.] Opinion of the Court—WHITE, J.

“Have employed eminent counsel. Must have your assistance. Estate has no funds.”

On February 3, 1896, the receiver sent a letter, stating, among other things, that all the assets of the German-American Safe Deposit & Savings Bank were not actually worth over \$1,000, and that claims had been filed against it to the amount of over \$90,000, and suggesting that the Independence National Bank join in a plan to employ and pay the receiver's attorney to bring suit on the warrants. On February 13th the Independence National Bank wrote, inquiring who the other parties were who would be interested in this suit, what the receiver proposed to do, and what the probable expense would be. To these questions the receiver made no response. On April 2d the receiver wrote, asking the Independence National Bank to send \$132, to be paid to his attorney as fees. And on April 9th the Independence National Bank answered this letter, declining to employ the receiver's attorney. At all times from the 20th day of June, 1895, until July 1, 1899, the city of Tacoma claimed that these warrants were invalid, and the city was contesting its liability on its general fund warrants in the courts. The answer of the city treasurer in the Jordan case was filed on June 25, 1895. And on July 21, 1895, Judge Stallcup, of the superior court, had delivered an opinion in that case, holding all of the outstanding city warrants, except about \$23,000, issued in 1892, to be invalid. No interest had been paid on the loan since October 31, 1895. On April 14, 1896, the president of the Independence National Bank sent the following letter to the receiver:

“Philadelphia, April 14, 1896.

S. R. Balkwill, Esq., Receiver,

German-American Safe Deposit & Savings Bank,
Tacoma, Washington.

Dear Sir:—We beg to notify you that the warrants

which we hold as security for the payment of certificate of deposit issued by the German-American Safe Deposit & Savings Bank, No. 181, for \$18,000, dated June 8, 1895, will be sold at public sale in this city on Thursday, the 23d instant.

Yours truly,

(Signed) R. L. Austin, Pt.”

This letter was received by the receiver about April 21, 1896, and he sent the following telegram:

“To the Independence National Bank, Philadelphia, Pennsylvania. Trust we will have no trouble with you over the warrants, as we hope to pay you in full shortly. S. R. Balkwill, Receiver.”

The warrants were delivered to M. Thomas & Sons, auctioneers, to sell. The sale was advertised in a catalogue of real estate and stocks to be exposed for sale at the Philadelphia Exchange on Thursday, April 23, 1896, at twelve o'clock noon. The item of these warrants is the first one in the list contained in the catalogue. Fifteen hundred of these catalogues were circulated among the banks, trust companies, insurance companies, bankers, brokers, and capitalists of the city of Philadelphia previous to the sale. The sale of the warrants was also advertised in the Philadelphia Ledger, a newspaper of general circulation in Philadelphia, in the issues of April 21, 22 and 23, 1896. The warrants were sold in accordance with the advertisement on the 23d day of April, 1896, at the Philadelphia Exchange, for the sum of \$5,000, on a bid made by George S. Crapt, a broker acting in behalf of the Independence National Bank, and his bid was the only bid made at the sale. There were at least fifty persons present at the sale. The sale was made in regard to place, time, manner, and notice in the way that is customary in Philadelphia.

On December 21, 1896, in the suit brought by Murry, a tax payer, against the city and its officials, the superior

April, 1901.] Opinion of the Court—WHITE, J.

court entered a decree holding all of the outstanding warrants of the city to be invalid. The Independence National Bank joined other warrant holders in paying the expenses of the test suit of Eidemiller against Tacoma. The Independence National Bank also joined other warrant holders in paying the expenses in the case of Bardsley against Sternberg,—a suit brought to test the validity of warrants similar to those involved here. The superior court on April 7, 1897, entered a decree in the Bardsley case holding the warrants involved to be invalid, and on June 25, 1897, this court rendered an opinion sustaining that decree. Afterwards, on rehearing, an opinion was rendered on February 18, 1898, reversing the lower court. The city still continued to contest its liability on its warrants, and the warrants in controversy here, together with many others belonging to other holders, were assigned to Francis B. Muhlenberg for collection. The Independence National Bank joined with others in paying the expenses of this Muhlenberg suit. The Independence National Bank has spent \$2,745.48 in carrying on litigation on these warrants. Each of the holders who joined in the payment of the expenses of the Eidemiller, Bardsley, and Muhlenberg cases paid a sum equal to ten per cent. of the face value of the warrants held by them. Muhlenberg is a clerk in the Independence National Bank. The court below concluded as a matter of law that the Independence National Bank of Philadelphia held said warrants under its original pledge, and that Balkwill, as receiver of the German-American Safe Deposit & Savings Bank, was the legal owner of the same, and had the right to the possession of the same upon paying to said Independence National Bank of Philadelphia, or by depositing with the clerk of the court for said Independence National Bank of Philadelphia, its original debt of \$18,000, and six per cent.

interest from the 31st day of October, A. D. 1895, until paid, and the sum of \$2,745.48 expended by the Independence National Bank of Philadelphia in protecting the warrants and proving the validity of the same, less the costs and disbursements expended by intervenor in the intervening proceeding; and that intervenor was entitled to be subrogated to the rights of plaintiff in the decree heretofore entered in this cause in favor of plaintiff and against the city of Tacoma and its treasurer, so far as said warrants are concerned.

It is claimed that the respondent did not have the right to intervene. The warrants which were the subject-matter in litigation between the appellant and the city of Tacoma were pledged to the Independence National Bank of Philadelphia, for whom the appellant was acting as trustee in prosecuting the suit against the city. While the property was transferred as a pledge to the Independence National Bank, the legal title remained in the German-American Safe Deposit & Savings Bank, for which the respondent was receiver. Jones, Pledges, §§ 7-9. The respondent claimed, in his complaint of intervention, that the alleged sale under which the Independence National Bank of Philadelphia claimed title was not made in good faith, but was fraudulent and collusive, and for the purpose only of vesting title in the Independence National Bank, and cutting off the claims, rights, and equities of the respondent therein. If such was the case, the general property in the warrants never passed from the respondent or the German-American Safe Deposit & Savings Bank to the Independence National Bank, and the appellant would, in law, be a trustee for both the Independence National Bank and the respondent. The receiver was equally interested with the Independence National Bank in seeing that the validity of these warrants was established, and was likewise in-

interested in any judgment recovered against the city of Tacoma on the establishment of this validity. The appellant, however, claimed that the respondent had no title or interest in the warrants or in the judgment that might be recovered thereon, and he assumed to act only for the Independence National Bank, and adverse to the respondent. In suits in equity brought by a trustee or otherwise affecting trust property, the beneficiary of the trust may intervene for the purpose of protecting his interest, and particularly so when the trustee shows a disposition to act adversely to his interest. *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. 851; 11 Enc. Pl. & Pr. 500.

Our statute relevant to intervention is that:

“Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant. . . .” Bal. Code, § 4846.

The plaintiff had a direct interest in the matter in litigation. He was interested in seeing that the validity of the warrants was established, and that a decree was entered against the city of Tacoma requiring payment. He was interested in the success of the plaintiff in obtaining this judgment. In the distribution of the proceeds of the judgment his interest was adverse to both the plaintiff and the defendant. The section quoted does not attempt to specify what or how great the interest of the intervenor shall be in order to give a right to intervene. Any interest is sufficient.

“The fact that the intervenor may or may not protect that interest in some other way is not material. If he has an ‘interest in the matter in litigation, or in the success of either of the parties,’ he has a right to intervene.” *Coffee v. Greenfield*, 55 Cal. 382.

After he has intervened, it is the duty of the court to dispose of the whole matter in controversy between the original plaintiff and defendant and the intervenor so that the interest of the intervenor shall be completely protected. If this was not to follow, the right to intervene would be a barren one. Hence we conclude that the respondent had a right to intervene in this action, and, if the allegations of his complaint of intervention are true, the judgment of the court must be upheld.

When the owner pledges property or choses in action for the payment of a debt, the creditor no doubt has the right to hold the pledge until the debt is paid, and the pledgor cannot recover back the pledged property until he tender, or pay, or offer to pay, the debt. This action is not primarily for the purpose of recovering back the pledged warrants. It is to determine whether the respondent is the owner of the warrants, and entitled to recover them back, upon paying the amount for which they were pledged to the Independence National Bank.

“An unlawful sale does not *per se* operate as a conversion, yet the pledgor may, at his option, so consider it, and that he may regard the contract as at an end, tender or offer to pay his debt and demand his pledge.” Jones, Pledges, § 571.

The respondent in this case offers to pay his debt, but the appellant in effect says, “I will not accept it; the warrants are mine.” Under such circumstances, why go through the useless ceremony of tendering the debt for which the warrants were pledged, particularly so when the intervenor only prays that he may be adjudged the owner

April, 1901.] Opinion of the Court—WHITE, J.

of the warrants subject to the payment of the indebtedness, and prays that, when the indebtedness is paid, the trustee may be directed to deliver to him the warrants? The appellant was clothed by the Independence National Bank with apparent ownership of the warrants, and, claiming to be such owner, brought this action against the city of Tacoma to establish the validity of the warrants; and, while the Independence National Bank might have been a proper party to the action, it is not a necessary party. The appellant stands in the place of the Independence National Bank so far as his connection with these warrants is concerned, and he holds them subject to all the equities existing in favor of the intervenor. The original action was commenced on May 17, 1898, and the order for leave to intervene was made on June 15, 1898. The complaint of intervention alleges that the Independence National Bank requested the respondent to procure an adjudication on the validity of the warrants, and that on the 10th of December, 1895, the Independence National Bank filed its claim with the respondent, as receiver of the German-American Safe Deposit & Savings Bank, for the loan for which the warrants were pledged; and the further allegation is made that the intervenor had no notice of the sale prior to the time it was made, that no assets came into his hands with which to redeem the warrants, and that this was known to the Independence National Bank; and it is further alleged that the Independence National Bank never informed or notified intervenor that it made an absolute claim of ownership to the warrants, but by its conduct led the intervenor to believe, and he did believe, that the German-American Safe Deposit & Savings Bank had an equity in the warrants. There is nothing in the complaint of intervention showing laches on the part of the intervenor, and we have already held

that the fact that he had another remedy was not material if his petition of intervention showed that he had an interest in the matter in litigation. We think the complaint of intervention stated a cause of action, and that the demurrer to the same was properly overruled. All questions involving the correct determination of this case center around the twenty-second finding of fact, which is as follows:

“That said Independence National Bank of Philadelphia made said attempted sale of said warrants on April 23, 1896, for the sole and only purpose of getting title to said warrants, and not for the purpose of paying said certificate of deposit, and not for the purpose of the liquidation of said certificate of deposit.”

The evidence, in our opinion, fully sustains this finding. The German-American Safe Deposit & Savings Bank was a defunct institution, without assets sufficient to pay the cost and expenses of the receiver in winding up its affairs. It was absolutely beyond the power of the receiver knew this; knew also that it must look alone to the city of Tacoma for the payment of the warrants. At the time the sale was made, the Independence National Bank knew that the warrants themselves were valueless, because the city of Tacoma was refusing to pay them, and was refusing to recognize them, with a large lot of other similar warrants, as its obligations, and was contending that the same had once been paid, and that they were nullities; and this contention of the city, according to the undisputed facts, was known to the Independence National Bank as early as June 20, 1895, and from that time until February 18, 1898, when this court, on a rehearing, changed its former views and established the validity of similar warrants. *Bardsley v. Sternberg*, 18 Wash. 612 (52 Pac. 251, 524.) These claims of the city as to the invalidity of the warrants, etc., were well known to the

April, 1901.] Opinion of the Court—WHITE, J.

appellant at the time of the notice of the sale, and at the time of the sale, and the least inquiry would have given the same information as the Independence National Bank possessed to any proposed investor or purchaser. We have a right, under such circumstances, to presume that the Independence National Bank considered the warrants valueless for all marketable purposes, and that offering them for sale was but a mere idle ceremony. We think it is clear that the only object of the sale was to vest the title of the property in the Independence National Bank, so that it might be able to handle it to the best advantage if any opportunity should occur to settle with the city of Tacoma. Mr. Austin, president of the bank, testified: "We sold them in following out a universal practice, when a debt which is not paid, to always sell the securities protecting it *to get title to the property*, so we may be in position to handle it to the best advantage." The object of the sale of a pledge contemplated by the law is to realize thereon in payment of the debt, and, if conducted fairly under the power given to the pledgee, it will not be set aside because the highest market price was not realized.

We will now review the cases cited by the appellant. *King v. Texas Banking & Ins. Co.*, 58 Tex. 669, simply holds that the pledgee is not required to wait until the money market is better; that the parties must have contemplated when the pledge and debt were made that there would be risk of fluctuations in the money market. In *Whitin v. Paul*, 13 R. I. 40, it is held that the pledgee of a chose in action given as a collateral was bound to use reasonable and ordinary diligence in realizing its value, but he was not bound to exercise extraordinary care, and was not bound to watch the market for the most favorable opportunity to sell the pledge. This case is far from supporting the proposition that the pledgee can sell when there

is no market, and when he knows the thing offered for sale, by reason of unforeseen circumstances, is like so much waste paper, and has lost all its market value, and that such circumstances could not have been in contemplation of the parties when the pledge was made. Under such conditions it was the duty of the pledgee to take action, or at least he should have requested the pledgor to take the necessary steps to establish the validity of the pledge. If the pledgor, on such request, should refuse to act, then a sale might be made, for the refusal of the pledgor to act would be equivalent to an abandonment of the property. In *Franklin National Bank v. Newcombe*, 37 N. Y. Supp. 271, the court simply held that the creditor had a right to collect when his claim became due, and that the debtor could not compel him to wait because it was inconvenient to pay, and a bad time to realize on his assets. The stock and bonds in that case had some market value, and the pledgee knew he could realize something on them at the sale. The presumptions are all the other way in the case at bar. In the case of *Hewitt v. Steele*, 136 Mo. 327 (38 S. W. 82), the stock had a value, and was sold for its full market value, and the complaint was that it was possible to have obtained a greater price for the stock if it had been sold before. The gist of that action was the alleged negligence of the debtor in selling stock for less than its value. *Union National Bank v. Forsyth*, 50 La. An. 770 (23 South. 917), simply holds that a sale on a depreciated market is permissible. In that case there was a market rate, and the pledges were sold for such rate. In *Newsome v. Davis*, 133 Mass. 343, it was held that the defendant was bound to exercise reasonable care and diligence to obtain whatever the stocks were worth at the time of sale. These are the cases cited by the appellant to sustain the alleged sale. In all these cases there was a market

value to the thing sold at the time of the sale, and the sale was for the purpose of liquidating the debt and actually realizing on the security.

The power of sale must be exercised with a view to the interests of the pledgor as well as of the pledgee. The unfairness and inequitableness of this case consisted in attempting a sale when the pledgee knew there was no market value for the pledge, knew that he had to look to the pledged property alone for payment, and knew that suits were pending to prove the pledged property of a value far in excess of the amount of the debt for which they were pledged. Under such circumstances we think it was the duty of the pledgee to refrain from a sale of the pledged security until it was determined whether they were valid obligations or not. The Independence National Bank knew that it must get its money only out of the city of Tacoma upon these warrants, and that nothing could be realized from the insolvent pledgor, and that a sale to itself would not add one dollar towards the payment of the debt. It would put the bank, however, in a position to receive almost twice its debt if, by such a sale, it could obtain title, and if the warrants, after litigation thereon, should prove to be valid obligations against the city. If the warrants were invalid, it would realize nothing; and this would be true whether it was the owner or not of the warrants, and whether there was a sale or not. There can be no pretense that there was any intention of realizing money by reason of this sale. The bank had no purchasers in sight, and, under the circumstances, could reasonably expect none. As was said by Judge BELLINGER in *Morris v. Eastside Ry. Co.*, 95 Fed. 13:

“The real character of the transaction shows through all these circumlocutions. The German Savings & Loan Society was not seeking to realize upon its securities, but to

effect a transfer of the title of the bonds held by it to Morris & Whitehead. . . . But whether the pledgee may buy at his own sale is not considered. It is enough to defeat the sale that it was contrived between the seller and the buyer, in order to get the pledgor's title at a sacrifice of his interest, with that result. I am of the opinion that the purchasers of these bonds are only entitled to a decree for the amount of the debts for which the bonds were pledged, and interest and costs; and this conclusion is based upon the fact that the sale to Morris & Whitehead was pre-arranged between the parties, that it was contrived between them as a means of acquiring the property pledged, and that it is immaterial whether the German Savings & Loan Society have any interest in the sale or not. . . . If this is so, it is unconscionable that the mortgagors, or, what is the same thing, the other creditors, shall lose this excess by the expedient of this sale, while some \$5,000 of the original debt remains unsatisfied in the hands of the purchaser at the sale. If it shall turn out that the price bid is substantially all that the bonds are worth, then the considerations upon which this decree is based will fail. . . . In that case the purchasers at the sale will not be prejudiced by the decree. In any event they will have their debt and interest, whether that is sufficient to absorb the property or not, and it is all they are equitably entitled to have."

In the case at bar, under the circumstances at the time of the sale, there certainly would be no purchaser for these warrants. The bank made a single bid of \$5,000. When the validity of the warrants was finally established by this court, the warrants ceased to be waste paper, and their par value was at once reestablished. The warrants now are worth about \$41,000, or some \$15,000 more than the claim of the Independence National Bank with interest and expense added. The Independence National Bank not only claims on a debt which originally amounted to \$18,000 securities from which it can at any time collect \$41,000, but, in addition to this, it also claims an indebt-

April, 1901.] Opinion of the Court—WHITE, J.

edness against the intervenor for some \$13,000, the difference between the amount of its bid and its debt, while other creditors of the German-American Safe Deposit & Savings Bank will realize nothing upon their claims. The Independence National Bank is in no way injured by holding this sale invalid, for it will receive, in any event, its entire debt, interest, and expenses, and this is all it is equitably entitled to. Under the circumstances of this case there appears to be no overpowering equity preponderating in favor of the appellant that would justify this court in placing the ownership of these warrants in his hands to the injury of the other creditors of the insolvent German-American Safe Deposit & Savings Bank.

We think, also, that the facts fail to disclose any laches on the part of the intervenor in asserting title to these warrants. The evidence shows that the Independence National Bank, shortly after intervenor's appointment as receiver, made a demand upon the intervenor for payment of its debt against his estate, and threatened, in case of default, to sell the warrants. Intervenor thereupon wrote the Independence National Bank that he was the receiver of the bank without funds, that the Independence National Bank could not realize its debt except out of the warrants held by it as collateral, that the city was refusing payment of these warrants, and that their validity must be established before a purchaser could be found for the same. The Independence National Bank apparently acquiesced in said statement of affairs, and thereafter, on December 10, 1895, filed with the intervenor its verified claim. On April 21, 1896, intervenor received the notice that the Independence National Bank proposed to sell said warrants on the 26th of the same month. Intervenor at once wired the bank that he trusted that they would have no trouble over the warrants, as they hoped to pay them in

full shortly, to which the Independence National Bank made no reply. In October, 1896, intervenor's attorney wrote said Independence National Bank relative to the warrant litigation, treating the warrants as still in pledge. This was allowed to pass by the bank without reply. Following this, in May of 1897, intervenor's attorney and the president of said Independence National Bank had an apparently amicable understanding relative to intervenor's and said Independence National Bank's interest in these warrants, in which President Austin admitted that, if they got their claim and interest, they would be satisfied. Thereafter intervenor's attorney from time to time kept said Independence National Bank posted on the progress of the warrant suits, at all times treating the warrants as still in pledge. All these communications were allowed to pass without response from the Independence National Bank. Intervenor's attorney was certainly looking after this litigation with a view to protecting intervenor's interest in said warrants, and he must have been under an impression, engendered by the silence of said Independence National Bank and the conversation with its president, that intervenor's interest in the warrants still existed.

The intervenor's attorney wrote to the Independence National Bank on the 15th of October and used this language: "Referring to the city warrants which you hold as security for a loan due from the German-American Safe Deposit & Savings Bank of this city, would say," etc. And in the latter part of this letter he used this language: "I think, however, everything will go through satisfactory, and that we will soon be able to adjust your claim in full." On July 12, 1897, in writing to said Independence National Bank, and in speaking of the first decision of this court, he uses this language: "This throws the warrant

April, 1901.] Opinion of the Court—WHITE, J.

holders back upon the proposition of suing the city for money had and received, which we shall do as soon as it is finally determined that the supreme court refuses a rehearing. We herewith enclose you a copy of the decision. I shall write you as soon as the supreme court finally decides the motion above referred to." And on February 20, 1898, after the validity of the warrants was sustained, he writes: "I trust that we can now adjust matters between receiver Balkwill and yourselves in accordance with the plan which I discussed with your Mr. Austin when in your city." This certainly shows that the intervenor and his attorney were keeping close watch on the warrant litigation, and were in the belief that said Independence National Bank would not claim ownership of said warrants. The Independence National Bank, after receipt of these letters written by the intervenor's attorney, by its silence, at least, induced the intervenor to believe that his rights were unimpaired. Under all the circumstances of this case we think that there is nothing from which it might be concluded that the intervenor in any way ratified the sale of these warrants, and we are unable to see wherein he was guilty of laches in asserting his claim to them. We conclude that the sale of the warrants by the Independence National Bank to itself under the circumstances disclosed in this case was for the sole purpose of obtaining title to the warrants, and not for the purpose of realizing thereon in discharge of the indebtedness for which they were pledged. And, being of this opinion, it is unnecessary to further consider whether or not the sale was made on proper notice, and the other questions discussed in the briefs.

The judgment of the lower court is therefore affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3744. Decided April 24, 1901.]

DAVID WHITNEY, JR., *et al.*, Appellants, v. A. N. SPRATT, Respondent.

PUBLIC LANDS — CANCELLATION OF ENTRY — NOTICE TO TRANSFEREE OF ENTRYMAN.

Under the rules of the land department of the federal government, the *ex parte* cancellation of an entry of public land is invalid, where the entryman had transferred his rights therein to another and the government had actual notice of the transfer but failed to give the transferee notice of the proceedings for cancellation.

SAME — TIMBER LANDS — CONSTRUCTION OF STATUTE.

Under 20 St. at Large, 89, which provides for the sale of public lands, "valuable chiefly for timber, but unfit for cultivation," a ruling by the commissioner of the general land office that lands which were chiefly valuable for timber at the time of entry, but which could be cultivated after the removal of the timber, were not purchaseable under the act, was erroneous.

Appeal from Superior Court, Cowlitz County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

Dolph, Mallory, Simon & Gearin, for appellants.

Stott & Stout and *T. H. Ward*, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Suit commenced by plaintiffs against defendant to remove a cloud from plaintiff's title to section 32, township 9 N., range 4 W., in Cowlitz county. Only the northeast and the southeast quarters of the section are in controversy upon appeal, plaintiffs having succeeded as to the other half of the section. The defendant answers, alleging that plaintiffs' claim to the northeast quarter of said section was deraigned through one Henness, who held under patent from the United States, and the southeast quarter was claimed by plaintiffs through one Walker, who likewise held under patent from the government; that

April, 1901.] Opinion of the Court—REAVIS, C. J.

such patents were wrongfully issued to Henness and Walker, and in truth and equity defendant is the owner of the two quarter sections, deraigning title to the northeast quarter from one Frank Smith, and to the southeast quarter through one James M. Radcliffe; that Smith and Radcliffe entered, respectively, the said northeast and southeast quarters as timber land, on May 26, 1883, under the "timber and stone" act of congress of June 3, 1878 (20 St. at Large, 89), and made application to purchase the same, both applications being made on the same day; that they each complied with the law in relation to the purchase of timber land, and each paid the purchase price thereof to the government and received a receiver's certificate therefor; that after the receipt of such certificates they, by warranty deed, duly transferred the respective tracts, for a valuable consideration, to A. N. Spratt, defendant; that on the 21st of January, 1886, the commissioner of the general land office erroneously canceled the entries of Smith and Radcliffe, and thereafter issued the patents to Henness and Walker. The proceedings of the land department are set out with particularity, and the answer alleges that such proceedings were invalid, because no notice was given to Spratt, the transferee of Smith and Radcliffe. It is also alleged that the commissioner of the general land office erred in his construction of the timber purchase act, in that he ruled that land which was chiefly valuable for timber, but which could be cultivated after the timber was removed, was not purchaseable under the act, and held the entry was void on that ground. Defendant prays that he may be declared the equitable owner of the two quarter sections, that plaintiffs be adjudged to hold the patents in trust for him, and that conveyance of the legal title be made to him. By stipulation all the evidence and proceedings in the land department

are in the record. Defendant introduced competent testimony tending to show that the entries of Smith and Radcliffe were made in good faith; that the two quarter sections entered by them were in fact timber land, more valuable for the timber than any other purpose, incapable of cultivation until the removal at great expense of the timber therefrom, and that such premises were in fact timber lands under the act of congress.

As observed by counsel for appellants, two questions arise here: 1. Was Spratt, the transferee of the entrymen, Smith and Radcliffe, entitled to notice of the proceedings in the land office which resulted in the cancellation of their entries? It may be observed that the warranty deeds, executed by the entrymen conveying their lands to Spratt, were of record in the auditor's office of Cowlitz county before the contest for cancellation was instituted, and that the special agent, who made the examination, and upon whose reports the proceedings were instituted, advised the land department of the transfers. It will thus be seen that knowledge of these transfers and of the interest of Spratt was conveyed to the land department before the notice of contest was given to the entrymen, and notice was directed to be given to the transferee by the commissioner of the general land office, but in fact was not given, and the transferee had no knowledge of the contest. The commissioner of the general land office, after a hearing, which was *ex parte*, canceled the entries of Smith and Radcliffe, and thereafter issued the patents to Henness and Walker, through whom plaintiffs deraigned title. It would seem upon these facts that the established rule as to notice pursued by the land department for many years was violated in the proceedings for cancellation. *United States v. Copeland*, 5 Land Dec. Dep. Int. 170; *United States v. Richardson*, 5 Land Dec. Dep. Int. 253; *Wind-*

April, 1901.] Opinion of the Court—REAVIS, C. J.

sor v. Sage, 6 Land Dec. Dep. Int. 440; *United States v. Thomas*, 9 Land Dec. Dep. Int. 576; *Fleming v. Browe*, 13 Land Dec. Dep. Int. 78; *United States v. Newman*, 15 Land Dec. Dep. Int. 224.

The courts will take judicial notice of the rules and decisions of the land department. *Caha v. United States*, 152 U. S. 211 (14 Sup. Ct. 513).

The respective parties to the cause have also submitted a stipulation that knowledge of rules and decisions of the land department is recognized in the hearing of this cause. But apparently the necessity of such notice to foreclose the rights of the transferee has been set at rest by the highest authority. In *Guaranty Savings Bank v. Bladow*, 176 U. S. 448 (20 Sup. Ct. 425), the pertinent facts for consideration here were that one Anderson filed his homestead application, thereafter commuted his homestead to a pre-emption entry, made final proof of his claim, and received a final certificate which was duly recorded in the proper county, and thereafter executed a mortgage upon said land in good faith, which mortgage was properly recorded. Thereafter the commissioner of the general land office held the entry of Anderson for cancellation on the ground that proper proof of residence was not shown, and thereafter Bladow, defendant, contested the entry of Anderson, and gave due notice of the hearing to Anderson, and upon said hearing Anderson's entry was canceled. The mortgagee was not notified of the hearing. Upon these facts the court observed:

“But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein

showing the validity of the entry, or from proceeding before a judicial tribunal, against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been canceled.”

The defendant, in his answer, having alleged his equitable claim to the land in controversy, the invalidity of the cancellation of the entries of Smith and Radcliffe, and the lack of notice of the hearing in the land office to the transferee, Spratt, fully shows his right to a judicial hearing and determination of the controversy. He has not relied upon the certificate of the entries of Smith and Radcliffe, but has shown by evidence other than the certificates the validity of those entries. The findings of fact of the trial court show that the land in controversy was in fact timber land, within the provisions of the act of congress, and that the entries were made in good faith. We have reviewed the testimony, and we fully approve the findings. We have examined with care the authorities adduced by counsel for appellants. The case of *American Mortgage Co. v. Hopper*, 56 Fed. 67, determines only that the certificate of payment issued to a pre-emptor of public lands may be canceled by the land department; that the certificate is merely an equitable interest in the entryman, and a purchaser from him before a patent issues cannot claim to be protected, as a *bona fide* purchaser, from cancellation of the certificate, on the ground that it is fraudulent and void. In that case the transferee had no notice, but he relied entirely on the validity of the certificate, and did not show in fact that the entry was valid. In the same case on appeal in the ninth circuit (64 Fed. 553), it was determined that, where the land department cancels after issuance to a pre-emptor of a final certificate on the ground that the entry was fraudulent, and issues a patent to

April, 1901.]

Syllabus.

another, the burden is on such pre-emptor, or those claiming under him, in an action to recover the land from the patentee, to show that the department erred in adjudging the title to the defendant, and that the transferee was not entitled to protection as a *bona fide* purchaser. This is not inconsistent with the determination in *Guaranty Savings Bank v. Bladow*, *supra*. Some of the expressions used in the opinion in *Cook v. Blakely*, 6 Kan. App. 707 (50 Pac. 981), do not seem to be in accord with the weight of authority.

2. Did the commissioner of the general land office err in his construction of the timber act? We are inclined to conclude that he did. An examination of the facts before the commissioner and his construction of the law discloses that he determined that the lands, which were chiefly valuable for timber at the time of the entry, and then unfit for cultivation, were not within the provisions of the timber purchase act. This construction was erroneous. *United States v. Budd*, 144 U. S. 154 (12 Sup. Ct. 575), where facts of a similar nature were before the court.

The judgment of the superior court is affirmed.

FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3609. Decided April 25, 1901.]

GEORGE W. FISCHER *et al.*, Respondents, v. SAMUEL C. WOODRUFF *et al.*, Defendants, PROVIDENT LIFE & TRUST COMPANY, of Philadelphia, Appellant.

25	67
30	593
31	66
25	67
40	584

MORTGAGES—ASSIGNMENT—ILLEGAL CANCELLATION OF MORTGAGE—
SUBSEQUENT INCUMBRANCES.

A *bona fide* assignee of a note secured by mortgage was not estopped, by the subsequent act of his assignor in cancelling the mortgage of record, from asserting the validity of such mortgage

against a subsequent incumbrancer for value and in good faith, who took a mortgage of the same premises from the same mortgagor, in reliance upon the cancellation of the prior mortgage, and in ignorance of its actual assignment, when it was not requisite under the recording acts in force at the time that the assignment of a mortgage be made a matter of record.

SAME — RIGHTS OF ASSIGNEE.

Where the *bona fide* purchaser of a note secured by mortgage assigns same after maturity, the assignee is not subject to defenses that could not have been urged against his assignor, merely from the fact that his purchase was made after maturity.

SAME — TAXES — PAYMENT BY JUNIOR MORTGAGEE — LIEN.

A junior mortgagee who pays the taxes on the mortgaged property for the purpose of protecting its lien, and without knowledge of the existence of a prior mortgage thereon, is entitled to have the sum paid for taxes declared a lien superior to that created by the prior mortgage.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Modified.

E. R. York (*P. Tillinghast*, of counsel) for appellant.

Ira Bronson, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—On September 8, 1891, the defendant, Samuel C. Woodruff, who was then an unmarried man, made and delivered to the defendant George G. Mills, his promissory note for \$4,000, payable on or before two years after date, with interest. At the same time, and as security for the payment of the note, Woodruff executed and delivered to Mills a mortgage upon certain real property situated in Thurston county. On the 14th day of the same month the mortgage was duly recorded in the auditor's office. Within ninety days after the execution of the note,—the exact date not being shown,—Mills, for value, indorsed the note to the defendant Pauline Leberman, who on the 6th day of February, 1893, indorsed it to the co-

April, 1901.] Opinion of the Court—FULLERTON, J.

partnership of Fischer & McDonald. McDonald subsequently died, and through probate proceedings had in the administration of his estate, the note was, after its maturity, sold and indorsed to the respondents in this action. No formal assignment of the mortgage was ever made, and on the 18th day of July, 1892, it stood on the records in the name of, and as the property of, Mills. On that day Mills, while the note was in the hands of Pauline Leberman unpaid, without her knowledge or notice to her, acknowledged on the margin of the page on which the mortgage was recorded, over his signature, satisfaction in full of the mortgage. Two days thereafter the appellant made a loan to Woodruff of \$8,000, taking his promissory note for that sum, and a mortgage upon the above mentioned property as security. At that time it had no notice or knowledge that Mills at the time he undertook to satisfy the mortgage had parted with his interest in the note; nor did it have notice that the note remained unpaid, or that Mills had no authority from the owner and holder of the note to satisfy the mortgage of record. In 1897 the appellant foreclosed its mortgage, sold the mortgaged premises, bid them in at the sale, and now holds a sheriff's certificate of sale therefor. Neither the respondents nor their immediate assignors, however, were made parties to these foreclosure proceedings. The present action is brought to foreclose the original mortgage. The complaint is in the usual form, and the answer, after denying the allegations of the complaint, sets out substantially the foregoing facts. The trial court adjudged the respondents' mortgage to be an existing lien superior to the rights of the appellant, and entered a judgment of foreclosure accordingly. The appeal is from that judgment.

The appellant moved in the court below to make the complaint more definite and certain, which motion the

trial court overruled. It also served interrogatories upon the respondents, to which they filed answers. It then moved for an order requiring the answers to be made more definite, which motion being denied, it moved for a dismissal of the action on the ground that the answers filed to the interrogatories were so indefinite as to amount to a refusal to answer, which motion was also denied. Error is assigned on these several rulings of the court, and a large space of the brief is given to an argument of these questions. We find no merit in these assignments. The complaint contained every necessary allegation, and the answers to the interrogatories were as definite as the facts within the knowledge of the respondents permitted them to be made. This is sufficient to comply with the requirements of the statute.

The principal question is whether the satisfaction of a mortgage upon the record by a mortgagee, after he had assigned it, operates to cancel the mortgage as against a subsequent incumbrancer for value and in good faith. It is the rule in this state that a mortgage conveys no title to the mortgaged premises; it is a mere security, and is satisfied and extinguished by the performance of the condition the performance of which it is given to secure. *Hitchcock v. Nixon*, 16 Wash. 281 (47 Pac. 412) *Dane v. Daniel*, 23 Wash. 379 (63 Pac. 268). It is also a familiar rule, at least in those jurisdictions where a mortgage is a lien merely, that, where a debt is secured by a mortgage, the debt is the principal, and the mortgage the incident, and that an assignment of the debt is an assignment of the mortgage. From these principles it is clear that Mills, when he indorsed the note sued upon to Mrs. Leberman, parted not only with all his interest in the note, but with his interest in the mortgage, also, and stood thereafter with reference thereto as a stranger, and could no more

April, 1901.] Opinion of the Court—FULLERTON, J.

legally cancel and satisfy the mortgage of record than could any stranger to the record. Whether, therefore, his apparently legal cancellation of the mortgage estops the assignee of the note from afterwards asserting the lien of the mortgage as against the appellant, who is an incumbrancer for value and in good faith, depends upon the recording acts. As the purpose of these acts is to protect subsequent *bona fide* purchasers and incumbrancers against prior unrecorded liens and conveyances, their propriety and utility may be conceded; but registration of instruments affecting property rights and titles is purely the creation of the statute, and, unless the statute requires the assignee of a mortgage to record the assignment, he is not guilty of negligence in failing to do so; nor is he estopped by an illegal, though apparently regular, cancellation of the mortgage from asserting it, even against a subsequent *bona fide* incumbrancer, if he had no notice of its cancellation prior to the time the subsequent incumbrance attached. *Oregon Trust Co. v. Shaw*, 5 Sawy. 336; *Reeves v. Hayes*, 95 Ind. 521; *Lee v. Clark*, 89 Mo. 553 (1. S. W. 142); *Joerdens v. Schrimpf*, 77 Mo. 383; *Bamberger v. Geiser*, 24 Ore. 203 (33 Pac. 609).

The inquiry is, then, did the recording acts, at the time of the assignment of this note and the time of the purported cancellation of the mortgage by Mills, require that an assignment of a mortgage should be recorded? In *Howard v. Shaw*, 10 Wash. 151 (38 Pac. 746), we held that they did not. The question was squarely presented in that case, and the ruling was made upon facts somewhat similar to the case at bar. The appellant questions the correctness of that decision, and asks that it be overruled; but a reexamination has convinced us that the case correctly interprets the statutes, and, were it an original question, we would hold the same way. As the reasons

for the conclusion are fully stated in the opinion in that case, it is unnecessary to repeat them here.

It is next argued that the rule is not applicable to the respondents in this case, because, it is said, they are not *bona fide* assignees of the note. It is not disputed that the respondents purchased for value, and without actual notice that the mortgage appeared on the record to be canceled and satisfied in full; but it is said that, because they purchased after maturity, they must be held to have taken with notice of the satisfaction, and cannot now assert their want of actual knowledge. This is not the rule. It is not pretended that Mrs. Leberman was estopped, or would be had she attempted to foreclose the mortgage. Such rights as she had passed to the respondents by the several assignments.

The trial court found:

“That on the 26th day of November, 1897, The Provident Life and Trust Company, under the terms and authority given to it by its said mortgage for \$8,000, paid to the treasurer of Thurston county, Washington, the taxes duly levied and assessed against said mortgaged premises, and which were a lien thereon, for the years 1893, 1894, 1895 and 1896, amounting to the sum of \$1,804.86; that said sum has not been repaid to the said company, but is now due and owing to it, with interest thereon from November 26, 1897, at the rate of twelve per cent. per annum; that said payment of said taxes was made by said company without any knowledge or information of the rights, interests or lien alleged and claimed by the plaintiffs herein in, to, or upon said mortgaged premises, but believing that the said mortgage of said company for \$8,000 thereon was the first lien upon said premises.”

It refused, however, to adjudge that the amount so paid was a lien on the mortgaged premises, superior to the mortgage of the respondents. In this we think the court erred. These taxes were a paramount lien upon the prem-

April, 1901.]

Syllabus.

ises, superior to the lien of the respondents' mortgage, and for the non-payment of which the property might have been sold, and a superior title to the respondents' mortgage given. The payment was made in good faith by the appellant, without knowledge of the respondents' rights, for the purpose of protecting its lien upon the premises, and it would be far from just to give the respondents the benefit of these payments. There is nothing in the facts of the case that militates against the right, and we think that equity requires that they be declared a superior lien upon the lands in favor of the appellant.

The cause will therefore be remanded, with instructions to the lower court to so far modify the judgment appealed from as to allow the appellant a superior lien upon the premises for the amount of taxes paid by it, with legal interest from the time of such payment; also adjudging to the appellant any surplus that may remain after the satisfaction of the respondents' mortgage. The appellant will be allowed its costs on this appeal.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 3827.—Decided April 26, 1901.]

CHARLES ENGSTROM *et al.*, Respondents, v. CYRUS K.
MERRIAM, Appellant.

DAMAGES — FAILURE OF LESSOR TO GIVE POSSESSION OF LEASED PREMISES.

Where a lessor fails to give possession of premises leased for the purpose of engaging in a new business, the damages recoverable by the lessee are measured by the difference between the actual rental value and the rent reserved.

VERDICT — GENERAL CONTROLLED BY SPECIAL FINDINGS.

Where the special verdict of the jury fixes the various items of plaintiff's damages, both general and special, with the excep-

tion of one item of special damages alleged in the complaint, and the aggregate of the various items found in the special verdict, plus the amount of the item alleged in the complaint but omitted from the special verdict, is less than the general verdict, the general verdict must yield to the special, with the addition thereto of the omitted item, under the terms of Bal. Code, § 5022, which provides that when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Appeal from Superior Court, Spokane County.—Hon. THOMAS H. BRENTS, Judge. Reversed.

William Merriam and W. J. Thayer (Odell D. Thompkins, of counsel), for appellant.

Lewis & Lewis, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by respondents against appellant to recover damages for breach of a written contract of lease. The cause was tried by the court and a jury. A special verdict, aggregating \$365, and also a general verdict for the sum of \$826.25 were returned in favor of the respondents. Judgment was entered for the sum of \$826.25, in accordance with the general verdict. From this judgment appeal is taken. The statement of facts has been stricken by the lower court, so that all the record now before this court for consideration consists of the pleadings and the two verdicts above mentioned. In considering the question involved in this appeal it is not necessary to notice the answer, or reply, because the complaint and verdicts must determine the question. The allegations of this complaint, in brief, are as follows: Paragraph 1 sets out the lease by which respondents agreed to lease to appellant a certain building in Spokane for one year from October 1, 1898, to October 1, 1899,

April, 1901.] Opinion of the Court—MOUNT, J.

at the monthly rental of \$70; paragraph 2, that respondents on October 1, 1898, tendered the first month's rent; and paragraphs 3 and 4 allege compliance on the part of respondents, and a breach of the contract on the part of the appellant. Paragraph 5 alleges damages in the sum of \$2,400 "by the loss of the said lease and the use of the premises therein described during the time thereof." Paragraph 6 alleges damages in the sum of \$71, expenses incurred in making two trips for the express purpose of taking possession of the premises described in the lease. Paragraph 7 alleges damages in the sum of \$75 for loss of time in securing necessary stock with which to utilize the said premises. Paragraph 8, that respondents purchased fixtures and stock amounting to \$850, which they will be obliged to sell at a loss of \$550, and that they have been obliged to store the said stock at a cost of \$2.50 per month. Paragraph 9, that respondents "*have been damaged in all, as aforesaid*," in the sum of \$3,098.50, and the further sum of \$2.50 per month for continuation of storage." Then follows the prayer in accordance with the allegations. The special verdict of the jury, omitting the title of the cause, is as follows:

"1. How much damage did plaintiffs sustain by depreciation of cigars, whiskey, wines, fixtures, and other stock and furniture? Answer: None.

2. How much loss did plaintiffs sustain on account of traveling expenses? Answer: Thirty-five dollars (\$35).

3. How much damage did plaintiffs sustain by loss of time in negotiating for other premises? Answer: Thirty dollars (\$30).

4. What was the reasonable rental value of the premises in question on October 1, 1898, allowing them to be used for saloon purposes and all other purposes for which they were adapted? Answer: Ninety-five dollars (95) per month.

5. How much damage did plaintiffs sustain as the dif-

ference between the rental value of said premises and the amount of rent they were to pay defendant therefor? Answer: Three hundred dollars (\$300).

6. Could the plaintiffs by the exercise of reasonable care, have prevented any loss to their stock of goods and fixtures by depreciation? Answer: Yes.

(Signed)

T. M. Foster, Foreman."

The general verdict is as follows:

"We, the jury in the case of Charles Engstrom and August Anderson, plaintiffs, against Cyrus K. Merriam, defendant, find for the plaintiffs, and assess their damages at the sum of eight hundred twenty-six and 25-100 dollars (\$826.25).

Spokane, Washington, October 31, 1899.

T. M. Foster, Foreman."

No question is presented in this case concerning the items of special damages, and it is conceded, therefore, for the purposes of this case, that these items are proper elements of damage. Mr. Sedgwick, in his work on Damages (8th ed.), at § 185, lays down the general rule for the measurement of damages in cases of this kind as follows:

"Where a lessor fails to give possession of the leased premises, the measure of damages is the difference between the actual rental value and the rent reserved. The rule is the same, whether the leased property is a farm, a dwelling house, or hotel, or business premises. If, however, the premises were necessary to the plaintiff for carrying on an established business, and that fact were known to the defendant at the time the lease was made, the plaintiff might on principles elsewhere discussed recover further damages. The measure of damages would be the difference between the rent and the value for the plaintiff's business, which would involve an allowance of profits. If the business were a new one, since there could be no basis on which to estimate profits, the plaintiff must be content to recover according to the general rule."

See, also, 3 Sedgwick, Damages (8th ed.), § 1022; Suth-

April, 1901.] Opinion of the Court—MOUNT, J.

erland, Damages (2d ed), §§ 864-867; *Morgan v. Bell*, 3 Wash. 554 (28 Pac. 925, 16 L. R. A. 614).

There is no allegation in the pleadings that these premises were necessary to plaintiffs for carrying on an *established business*, or that the purpose of the lease was known to defendant at the time the lease was made. On the contrary, it inferentially appears from the complaint that the plaintiffs were about to engage in a new business, because it became necessary to purchase a stock of goods and fixtures with which to occupy the premises, and damages are claimed both for time lost in so doing and also for depreciation of the stock purchased. Hence the general rule must prevail with reference to the measure of damages for loss of the use of the premises.

Having, then, the rule of damages as the same must apply in this case, we now revert to the principal question involved in the case, which is, Did the court err in entering judgment for the amount of the general verdict? By § 5022, Bal. Code, it is provided:

“When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.”

It is necessary to consider the special verdict in order to determine whether all the elements of damage are passed upon by the jury, and to what extent the general verdict is inconsistent therewith, if at all. It will be noticed that the damages alleged in the complaint are: (1) general damages by reason of the loss of the use of the premises; (2) special damages for expenses of a trip to take possession of the premises; (3) special damages for loss of time in purchasing stock, with which to utilize the said premises; (4) special damages caused by depreciation in the stock purchased; (5) storage charges at \$2.50 per month. The first question presented to the

jury, viz: "How much damage did plaintiffs sustain by depreciation of cigars, whiskey, wines, fixtures, and other furniture?" clearly refers to the fourth item of damages as alleged in paragraph 8 of the complaint, omitting the cost of storage, and the answer is, "None." The second question, "How much loss did plaintiffs sustain on account of traveling expenses?" refers to the second element of damages as alleged in paragraph 6 of the complaint; and the answer is "\$35." The third question is, "How much damage did plaintiffs sustain by loss of time in negotiating for other premises?" Answer: "\$30." This question and answer do not clearly appear to be pertinent to any of the elements of damage alleged. It possibly was intended to refer to damages alleged for loss of time in securing stock with which to utilize the premises, as alleged in paragraph 7 as the third element of damages. It probably was intended to cover the storage charges for one year at \$2.50 per month, as alleged in paragraphs 8 and 9, as the fifth element of damages. Whatever the truth may be, it referred to one or the other of these elements of damage, otherwise it was entirely improper. We assume that it referred to the item most favorable to respondents, viz., the storage, being the fifth element of damage. The fourth and fifth questions, viz.: "What was the reasonable rental value of the premises in question on October 1, 1898, allowing them to be used for saloon purposes and all other purposes for which they were adapted?" Answer: "\$95 per month;" and "How much damage did plaintiffs sustain as the difference between the rental value of the said premises and the amount of rent they were to pay defendant therefor?" Answer: "\$300,"—referred to the first element of damage as alleged in paragraph 5, and covered the question of general damages. It is therefore readily seen that the special ver-

April, 1901.] Opinion of the Court—MOUNT, J.

dict, while not in the order of the allegations of the complaint, covered each of the general and special damages, with the single exception of the item of expenses for loss of time after the making of the lease in purchasing fixtures and goods with which to utilize the said premises. The complaint alleges \$75 for this item. Taking the construction of these special verdicts most favorable for the respondents, the general verdict is in excess of the special verdict, and the only item not taken into account thereby, viz., \$75, as alleged in the complaint, by \$386.25.

We conclude, therefore, that the court erred in entering judgment upon the general verdict, for the reason that the same cannot be harmonized with the findings of the special verdict and the allegations of the complaint, and that the special verdict must control the general verdict as to all questions passed upon by the special verdict. By giving judgment for the total amount of the special verdict and \$75 additional, the amount alleged for special damages in the seventh paragraph of the complaint, the court could not give judgment for more than the sum of \$440. The cause will therefore be reversed, with instructions to the lower court to grant a new trial unless respondents, within sixty days, remit the sum of \$386.25 from the general verdict. Appellant to recover costs on this appeal.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

80 DYER v. MIDDLE KITTITAS IRRIGATION DISTRICT.

April, 1901.]

Syllabus.

[No. 3574. Decided April 27, 1901.]

E. J. DYER, *Appellant*, v. MIDDLE KITTITAS IRRIGATION DISTRICT OF KITTITAS COUNTY, STATE OF WASHINGTON, *Respondent*.

IRRIGATION DISTRICTS — CONTRACT FOR CONSTRUCTION OF DITCH — INTERPRETATION — SUSPENSION OF WORK — RECOVERY OF INSTALLMENTS DUE.

Under a contract for the construction of an irrigation ditch, thirty miles in length, for which the contractor was to be paid at an agreed rate for excavation and materials, payment to be made monthly to the extent of ninety per cent. of the value of the work done, as estimated by the engineer in charge, "provided that if said contractor completes said work and estimates on the same are returned sooner than the funds from the sale of bonds reaches the treasurer of said district, then whatever estimate would have otherwise been payable . . . shall not be payable until the funds arising from the sale of bonds are in the hands of said treasurer to meet the same," the contractor is not required to complete the work before being entitled to maintain an action for any installment due him, but where, after having earned a monthly installment, he waits a reasonable time for the defendant to sell its bonds and pay him the compensation due, and defendant neglects and refuses to raise moneys from the sale of its bonds, he is warranted in suspending work and bringing an action for the recovery of the *pro tanto* amount due under his contract.

SAME — REFUSAL TO APPROVE ENGINEER'S ESTIMATE — EFFECT.

A contractor is not debarred from maintaining an action to recover compensation due him under the estimates returned by the engineer in charge of the work, by the fact that such estimates had never been approved by the board of directors of defendant corporation, as the contract required, when it appears that the refusal of the board to act upon the estimates was purely arbitrary.

SAME — DIRECTORS — POWER TO AUTHORIZE SUSPENSION OF WORK.

Under Bal. Code, § 4176, which provides that the board of directors of corporations organized for irrigation purposes shall have power to make and execute all necessary contracts, and perform all such acts as shall be necessary to fully carry out the

April, 1901.] Opinion of the Court—FULLERTON, J.

purposes of their charter, such board have power to make an agreement with a contractor that a contract lawfully entered into by them for the construction of an irrigating ditch may be annulled and work thereunder suspended.

SAME — CONTRACTS — CONSIDERATION.

An agreement for the abandonment of a contract needs no new or independent consideration to support it.

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Reversed.

Graves & Englehart, C. S. Voorhees and Reese H. Voorhees, for appellant.

Pruyn & Slemmons, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The appellant, who was plaintiff below, instituted this action to recover the price of certain labor and material alleged to have been furnished the respondent in the construction of an irrigating ditch or canal by one Peter Costello under a written contract entered into between Costello and the respondent. The trial court sustained a general demurrer to the complaint, and, upon the appellant's refusal to plead further, entered a judgment for costs in favor of the respondent. The ultimate question before us is, therefore, does the complaint state a cause of action?

The complaint alleges the due organization of the respondent as an irrigation district under and by virtue of the act of the legislature of the state of Washington approved March 20, 1890 (Session Laws 1889-90, p. 671), and the acts supplemental thereto; that after its organization the district voted for and sold bonds for the purpose of raising money to construct irrigating canals and works, and thereupon entered into a contract with one Peter Costello to construct for it an irrigating canal or ditch of

about thirty miles in length, according to certain plans and specifications theretofore adopted by the district. The contract is set out in the complaint, and contains, among others not material to be considered here, the following provisions:

“This contract, made and entered into this 23d day of July, A. D. 1894, by and between the Middle Kittitas Irrigation District, of Kittitas county, Washington, a public corporation organized and existing under and by virtue of the laws of the state of Washington, party of the first part, and Peter Costello, party of the second part,

“Witnesseth: That, whereas the said Middle Kittitas Irrigation District, by virtue of the authority vested in the board of directors of said district by laws of the state of Washington, hereby agrees to let unto the said Peter Costello, contractor, the entire work of constructing and completing a certain canal or ditch for said Middle Kittitas Irrigation District, to be known as the Middle Kittitas Irrigation Canal or Ditch, according to the specifications hereto attached and made a part of this contract, and the plans, profiles, and drawings on file in the office of the secretary of said district:

“Now, therefore, in consideration of the payments and covenants hereinafter mentioned, to be made and performed by the said party of the first part, the said Peter Costello hereby covenants and agrees to furnish all the material, labor, and appliances, and do all the work above mentioned in a substantial and workmanlike manner in strict accordance with the aforesaid specifications, plans, profiles, and drawings, and in strict obedience to any and all directions which may from time to time be given by the engineer in charge of said work, and to the satisfaction and acceptance of said engineer, and to the approval of the board of directors of said irrigation district. . . .

“The work embraced in this contract shall be begun within ten days after notice so to do shall be given by the engineer to the said contractor, and shall be carried on regularly and uninterruptedly thereafter with such force of employees as may be necessary to secure its full

April, 1901.] Opinion of the Court—FULLERTON, J.

and entire completion on or before the first day of May, A. D. 1895.

“In consideration of the construction and completion by the said party of the second part of all the work embraced in this contract in strict accordance with the aforesaid specifications, plans, profiles, and drawings, and the covenants and agreements herein contained, to the satisfaction and acceptance of the engineer in charge of the work, and the approval of the board of directors of the Middle Kittitas Irrigation District, the Middle Kittitas Irrigation District, party of the first part, hereby agrees to pay to Peter Costello, the party of the second part, the following prices, to-wit:

Solid Rock at \$1.00 per cubic yard.

Loose rock at \$0.32 per cubic yard.

Earth excavation at 10 4-10 cents per cubic yard.

Timber, tongue and grooved, at \$17.40 per M., B. M.

Rough lumber at \$16.40 per M., B. M.

Tunnel excavation, earth, at \$1.54 per cubic yard.

Tunnel excavation, loose rock, at \$3.74 per cubic yard.

Tunnel excavation, solid rock, at \$6.00 per cubic yard.

Timber lining for tunnel at \$18.40 per M., B. M.

Clearing 75 acres, more or less, at \$22.00 per acre.

Grubbing 20 acres, more or less, at \$80.00 per acre.

Cast iron at \$0.06 per pound.

Steel at \$0.06 per pound.

Concrete at \$9.00 per yard.

“The payments for the above work to be made in monthly installments, not to exceed ninety (90) per cent. of each estimate returned by the engineer; provided, that if said contractor completes said work and estimates on the same are returned sooner than the funds from the sale of bonds reaches the treasurer of said district, then whatever estimate would have otherwise been payable upon the return thereof by the engineer shall not be payable until the funds arising from the sale of bonds are in the hands of said treasurer to meet the same.

“And the said Peter Costello hereby covenants and agrees to construct and complete the entire work men-

tioned in this contract on or before the first day of May, A. D. 1895, and it is hereby expressly understood and agreed by and between the parties hereto that the specifications hereto attached are a part of this contract."

It is next alleged that, after entering into the contract, Costello prosecuted his work upon the canal until about the 4th day of November, 1894; that such work was performed in accordance with the plans and specifications, and in strict obedience to all directions which were given him by the engineer in charge of the work for the respondent; that the engineer in charge furnished the board of directors of the district with two estimates, the one of date September 18, 1894, which was for the amount of \$19,164.16, and the other of date November 20, 1894, for the amount of \$42,849.02; that the board of directors approved the first estimate, but failed, neglected, and refused to examine, approve, or take any action on the second; "that the total amount that was due to said Costello, under said contract, and the reasonable value of the work done by him as aforesaid, was the sum of \$62,013.18; that said district paid to said Costello, upon the amount so due the sum of \$18,300, leaving a balance due under said contract of \$43,713.18;" that the respondent had no other available resources from which to pay for the work called for by the contract, except by the sale of its bonds, and that on or about the 1st of November, 1894, while Costello was in the full and active performance of his contract, it became known to him that the respondent had not collected any money from the sale of the bonds since the payment of the estimate of September 9, 1894, and that it had no money wherewith to pay for the work then done, and for which payment was then due; that the purchasers of the bonds were unable to consummate the sale, and were in default several installments of the purchase price; that the respondent had taken no steps to compel payment of

the amounts due on the bonds, or to rescind the sale, or to make other dispositions of the bonds for raising money; that he could get no assurances from the respondent that money wherewith to pay for the work done upon the estimate then due would be raised within a reasonable time, or at all; that it was apparent that no money would be collected on account of the sale of the bonds, and that the conduct of the respondent made it to appear to be very uncertain whether it would be able to carry out its part of the contract, and that because of these things he deemed it necessary to suspend work until the respondent should raise the money, or take such action as would probably raise the money within a reasonable time. Then follow the following allegations:

“That the said Costello was unable to procure at that time a meeting of the board of directors of defendant, but did consult with the secretary of said board, and, with said secretary, drove some miles to the residence of the president of said board, and consulted with the said president as to what was most advisable for him (the said Costello) to do. That the said president stated to the said Costello that defendant had no money wherewith to make payment to the said Costello, and no prospect of getting any money for such payment, and that the said Costello should suspend work under said contract until such time as defendant could arrange to raise money wherewith to carry on said contract.

“That thereupon said Costello did stop work under said contract, under the conditions and for the purpose aforesaid, and that thereafter, to-wit, on or about the 6th day of November, 1894, a meeting of the board of directors of defendant was held at which the said Costello and president were present, and stated to said board the action taken by said president, and that said Costello had stopped work, as aforesaid, until defendant could arrange for raising funds within a reasonable time for making payment for the work then done under said contract, whereupon

he would continue said work; and the said board stated to said Costello that defendant had no money with which to pay for the work then done under said contract, and no prospect of getting any money for such purpose, and consented to, acquiesced in, and approved of the stopping of work by the said Costello, and the action of the said president in relation thereto.

“That for many months after stopping said work, the said Costello made many and persistent efforts to induce the defendant to take some action looking to the raising of money by the sale of said bonds for the purpose of carrying on said contract, and earnestly endeavored to secure from defendant some statement as to what defendant would do, or try to do, looking to the payment for the work already done and the completion of said contract, but defendant at all times would not and did not give the said Costello any definite statement, intimation, or information as to what defendant would do in and about the premises, or as to whether it would do anything. That said Costello had great difficulty in getting said board to meet for the purpose of considering the matter of defendant’s indebtedness to him, or the raising of funds by the sale of said bonds, and that said board showed a strong disposition and intention not to discuss said matters with said Costello, and to do nothing in regard thereto, and to do nothing toward performing defendant’s part of said contract, or any portion thereof.”

It is then alleged that the respondent delivered only \$20,000 face value, of the bonds sold, leaving with it unsold bonds of the face value of \$180,000; that it never at any time took any steps for the enforcement of the contract of sale, but rescinded the contract on January 12, 1895; that it wholly failed and neglected and refuses to offer the remainder for sale, or take any steps looking thereto, and that it has done nothing since the payment of the estimate of September 18, 1894, looking to the raising of funds for the carrying on of the contract, or any part thereof; that no part of the balance due for

the work performed has been paid, and on March 23, 1897, for a valuable consideration, Costello sold and assigned his claim to the appellant. The demand is for judgment for the sum of \$43,713.18, and legal interest from November 20, 1894.

The record does not disclose the reasons which induced the learned trial judge to hold that no cause of action was stated in the complaint, but we gather from the arguments of counsel it was not because of the omission of an essential allegation which could have been supplied by amendment, but was because the facts pleaded conclusively show that no cause of action had accrued, or could possibly accrue, to Costello by the terms of the contract. In support of this contention it is first urged that the contract is an entirety, and consequently must be performed as a whole before an action will lie for the contract price, or any installment thereof. Whether the contract is entire or separable may not be necessary here to determine, but, if it were so necessary, we think it could well be doubted whether it is entire in the sense contended for. There is no fixed price for the whole work, nor are the installments agreed to be paid by the terms of contract arbitrarily fixed, without regard to the amount and value of the work done at the time they are made payable. The party performing the work is to be paid at so much per cubic yard for stone removed, at so much per thousand feet for lumber furnished, at so much per acre for grubbing and clearing, and at so much per pound for iron and steel furnished; and the amount of the monthly installments are measured by these considerations, and are as capable of definite ascertainment at the end of the month as they would be at the time of the completion of the work. Contracts of this character are not usually regarded as wholly entire or wholly separable, but belong

to that intermediate class where partial performance entitles to partial recovery, subject to offset for damages suffered because of the failure to complete the contract as a whole, even when the party undertaking to perform the work ceases of his own volition and without lawful excuse before its completion. But, if we were to regard this contract as entire, we think the facts alleged in the complaint show a sufficient excuse for its non-performance on the part of Costello. Subject to the qualification contained in the proviso with regard to the time funds reached its treasurer, it is clear that the respondent was by the terms of the contract as much obligated to make monthly payments, up to ninety per cent. of the work performed during the preceding month, as Costello was obligated to perform the work. These promises were mutual and dependent, in the sense that nothing could be claimed until a month's work had been performed; but after that time they became independent, and the failure to make the payment on the part of the respondent operated to release Costello from further obligation to go on with the work; and rendered it liable to him for the work performed, at the contract price. This principle seems to be generally affirmed by the authorities. In *Phillips, etc., Construction Co. v. Seymour*, 91 U. S. 646, the plaintiffs entered into a contract with the defendant by which they undertook to construct a part of the Wisconsin Central railroad which the defendant had contracted to build. The contract provided, among other things, that payments should be made by the defendant, as the work progressed, on estimates made monthly by the engineer of the railroad company on the 15th of each month, for all work done on the previous month, except fifteen per cent., retained by defendant as security for performance on the part of the plaintiffs until the work was completed. The

plaintiffs brought their action of covenant on the contract, alleging that they had commenced the work in July, shortly after the contracts were signed, and had prosecuted it vigorously until some time in December; that the defendant had failed to pay the estimate for work done in October and November, and, seeing no prospect of payment, the plaintiffs were compelled to abandon the work. They asserted a claim for all the work done as estimated, and for various items of damage suffered by them in consequence of the failure of the defendant to make the payments as agreed. They recovered in the court below, and this judgment was affirmed by the supreme court; the court holding that the plaintiffs were not required, after the defendant had defaulted on a payment due, to proceed with the work, at the hazard of further loss, and that they were entitled to recover the contract price of the work done, together with the fifteen per cent. on the estimate retained by the defendant as security for the performance of the contract. In *Dobbins v. Higgins*, 78 Ill. 440, speaking of the rights of the parties to a similar contract, the court said:

“That there was a breach of contract on the part of appellants, cannot be contested. By their contract, they were bound to pay on estimates at the end of each month. . . . Having failed to make payment for the work performed in October on the contract, appellees had the unquestioned right to abandon the contract and to sue for and recover compensation for damages. The correct measure of damages was adopted by the instructions given for appellees. They informed the jury that they had a right to recover for the work done and not paid for, *pro tanto*, at the contract price. This has been repeatedly held by this court to be the true rule in this character of cases.”

In *Lord v. Belknap*, 1 Cush. 279, it was said:

“Whether mutual stipulations are dependent and conditional, or independent, is sometimes a difficult question. But, where time is given for performance on one side, and payments are to be made on the other within such time it is certain that the making of payments cannot depend upon a full and complete performance.”

And in that case it was held that, under a contract to construct and complete a portion of a railway in consideration of certain monthly payments, and the balance of the contract price when the work should be completed, the party undertaking the performance of the work could recover the monthly payments earned, although he had failed to complete the entire work. To the same effect is the case of *Perkins v. Locke* (Tex. Civ. App.), 27 S. W. 783. The syllabus of that case, which correctly states the point decided, is as follows:

“A contract for the building of a railroad provided for payment in first mortgage bonds, to be issued *pro rata* on the certificate of the chief engineer when each five miles was ready for rolling stock. The contract was to be forfeited ‘if said road, or any portion thereof, shall not be fully completed.’ *Held*, that the contract was not an entirety, but that the bonds should have been issued on the engineer’s certificate when each five miles were ready for rolling stock, and the right to them under the contract was not affected by the failure to complete the road.”

See also *Crawford v. McKinney*, 165 Pa. St., 609 (30 Atl. 1047); *Grand Rapids & Bay City R. R. Co. v. Van Deusen*, 29 Mich. 443; 2 Sutherland, Damages, (2d ed.) § 708; *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59 (38 N. E. 773, 30 L. R. A. 33.)

But it is said,—and this is, perhaps, the principal reliance of the respondent,—that it is especially provided in the contract “that if said contractor completes said work

and estimates on the same are returned, sooner than funds from the sale of bonds reaches the treasurer of the district, then whatever estimates would have otherwise been payable upon the return thereof by the engineer shall not be payable until funds arising from the sale of the bonds are in the hands of said treasurer to meet the same," and that the complaint shows upon its face that no funds have been received from the sale of the bonds since the first sale of \$20,000, which sum has been paid the contractor. It is argued that the language of the contract in this respect is plain and unambiguous, contains no doubtful phrases, or scientific or commercial terms which might be the subject of explanation, and hence there is no room for construction, and the contractor could neither abandon the contract, nor recover for any defaulted installment of the contract price, until he shows that the money from the sale of bonds actually reached the treasurer, and the respondent had then refused to make the agreed payments. To this there are two sufficient answers: The first is that the contract, when construed in the light of surrounding circumstances will not bear the construction the respondent would put upon it. It is a familiar rule that contracts will be given that construction which will best effectuate the intention of the parties, and that this intention must be collected, not from detached portions of the contract but from the contract as a whole. The court will, also, in determining the intention of the parties, look to the circumstances under which the contract was made, the subject-matter and the objects and purposes for which it was made. Applying these principles here, it cannot be supposed that the parties to the contract intended, by the proviso in question, to agree that the payment for this vast work should depend upon the contingency of the district being able to dispose of its bonds at the price limited

by the statute under which it was organized. It is shown by the complaint that the canal was to be some thirty miles in length. It was said in the argument that its estimated cost exceeded \$150,000. Certainly no prudent man would agree to a contract calling for the expenditure of this vast sum of money on the condition that it should or should not be returned to him as the contingency mentioned might or might not happen. The natural and obvious conclusion to be drawn from a reading of the contract is that the parties intended by the contract that the party doing the work should be paid for the work done in monthly installments, and, in any event, that, if the money to meet these payments was not on hand at the time the estimates were returned, a reasonable delay should not be deemed a breach of the contract on the part of the district; but more than this, it is evident, no one intended to claim. It was not intended or expected by either party that the contractor should complete the work, whether these installments were paid or not; nor was it intended that he should be paid only in the event the bonds were sold. Whether the contractor was warranted in ceasing work at the time he did cease, in the lights he then had, is not a material question now. Subsequent events have shown that he was. Had the district acquired funds to meet the payments due within a reasonable time after the work ceased, it might be a question whether he had not forfeited his contract, but the district cannot be heard to urge the matter at this time. It is not only shown that it did not acquire funds within a reasonable time, but it is shown that none had been received up to the time of the commencement of this action.

The second answer is the parties mutually agreed that the work should be suspended. To this it is objected that the board of directors of the district was without power

to consent to a cessation of work, and, if it had power and did so consent, there was no consideration for the agreement, and hence it is not obligatory. In support of the first proposition it is argued that an irrigation district is a quasi-municipal corporation, that the powers of its board of directors are limited to such as the statute clearly defines, and that no power is given the board to agree that a contract once lawfully entered into may be rescinded or annulled. The section of the statute defining the powers of the board of directors contains the following:

“The board shall have power, and it shall be their duty to manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act.” Bal. Code, § 4176 (Session Laws 1890, p. 677, § 11).

It is true that in this country all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may be reasonably inferred from the powers granted. But this rule must not be given a too narrow application, else, corporations may be denied in some cases the power of self-preservation, as well as many of the means necessary to effect the objects for which they were incorporated. Suppose, in this case, the district had made an improvident contract—had, for example, entered into an agreement to construct a canal which should be found after the work started, because of difficulties unforeseen, insufficient to carry water; could it be successfully contended that no power existed in the district to change or modify the mode of construction or abandon it altogether?

It would seem that this power would exist, from the mere grant of power to construct a canal. But the statute here is broad. Power is given the board of directors to "make and execute all necessary contracts . . . and generally to perform all such acts as shall be necessary to fully carry out the purposes of its charter." This power is amply sufficient to authorize the board of directors to annul a contract lawfully entered into, and of the necessity and sufficiency of the cause for such an act it is the sole judge.

As to the second objection, it is sufficient to say the agreement required no new or independent consideration to support it. *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 39 (36 Pac. 1098); *Long v. Pierce County*, 22 Wash. 330, 348 (61 Pac. 142); *Hathaway v. Lynn*, 75 Wis. 186 (43 N. W. 956, 6 L. R. A. 551); *Ruege v. Gates*, 71 Wis. 634 (38 N. W. 181); *Izard v. Kimmel*, 26 Neb. 51 (41 N. W. 1068).

It is further urged that the complaint shows that the estimates returned by the engineer, which gave rise to the claim sued upon, were never approved by the board of directors of the district, and that this is necessary, under the terms of the contract, before any obligation arises to pay for the work. On this point enough is alleged in the complaint to show that the refusal of the board to act was purely arbitrary. No reason for the refusal existed, if the allegations of the complaint be true, and they must be taken as true for the purposes of this demurrer. It is needless to add that the district cannot escape liability in this way.

The other reasons suggested for sustaining the judgment of the trial court require no separate consideration. On the whole, we think the complaint states a cause of action. Many of its essential allegations are, of course, travers-

able, and it may be that there are reasons why the appellant should not be permitted to recover; but such, if any there are, must be taken by answer.

The judgment appealed from is reversed, and the cause remanded with permission to the respondent to answer over.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3812. Decided April 29, 1901.]

NORTH WESTERN LUMBER Co., *Appellant*, v. CHEHALIS
COUNTY *et al.*, *Respondents*.

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TAXATION — OCEAN-GOING TUGS.

Ocean-going tugs, though registered at a foreign port and owned by a foreign corporation, are taxable under the laws of this state, when their *situs* is actually in this state.

ASSESSORS — TITLE TO OFFICE — COLLATERAL ATTACK.

The right of an assessor to his office cannot be collaterally attacked in an action to enjoin the collection of taxes levied upon property assessed by him.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Affirmed.

Sidney Moor Heath, for appellant.

W. H. Abel, Prosecuting Attorney, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Suit to enjoin the collection of taxes levied upon property belonging to appellant in Chehalis county. The assessor listed and assessed to appellant some reservoirs and lines of pipes in the town of Hoquiam, and also listed and assessed three steam tugs,—the *Traveler*, *Astoria*, and *Printer*. The complaint states that the acts of the assessor were invalid, and questions his right to his

office as assessor, and alleges that he arbitrarily, fraudulently, and maliciously overvalued personalty in the water works; that the tugs were ocean-going tugs, and in use wherever charters were available; that each was registered, under § 4319, Rev. St. U. S., at the port of San Francisco, and was assessed and paid taxes in the state of California; that plaintiff was a corporation organized under the laws of California and qualified to do business in the state of Washington. The superior court, after trial, found substantially the following facts: That the tugs Traveler, Astoria and Printer and the water works were assessed at a fair cash valuation required by law; that all the property mentioned was a part of the taxable personal property situate in Chehalis county, and said tugs, and each thereof, were so blended with the personal property in general situated in said county that it was impossible to distinguish it therefrom; that such property, and the whole thereof, was controlled at Hoquiam by the resident management of the plaintiff corporation, and each of said tugs was and has been engaged in plying wholly within the waters of this state. It concluded that the tax was legal and justly due, and rendered judgment dismissing the action.

The material controversy here is the validity of the assessment upon the three tugs. Counsel for plaintiff urges that, as these tugs were registered in the port of San Francisco, they are not liable to taxation in this state. The question is not entirely free from doubt. In 1854 the right to tax a vessel engaged in interstate commerce was considered by the supreme court of the United States in *Hays v. Pacific Mail Steamship Co.*, 17 How. 596. The facts were that the steamship company was incorporated under the laws of New York; that all the stockholders were residents and citizens of that state; that the principal office for transacting business was in the city of New

York, but the company had agencies in the cities of Panama, New Grenada, and San Francisco, California, and had a naval yard and ship yard for repairs at Benicia, California; that, on the arrival of the ships at the port of San Francisco, they remained no longer than to land passengers, mail, and freight, usually done in a day, then proceeded to Benicia for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business they were engaged in was transportation of passengers and merchandise, treasure, and the United States mail between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the territory of Oregon; that the company was the sole owner of the vessels, and no portion of the interests was owned by citizens of California; that the vessels were all ocean steamships, employed exclusively in navigating the ocean, and each of them was registered at the custom house in New York, where the owners resided; that taxes had been assessed upon all the capital of the company represented by the steamers in the state of New York under the laws of that state; that the vessels were assessed in the county of San Francisco, California, and the suit was to recover taxes paid under protest. The tax collector demurred to the complaint, and judgment was given for the plaintiffs. The court, in affirming the judgment, referred to the federal statutes of the 31st of December, 1792, and the 29th of July, 1850, which provide for the registration of vessels at the port which shall be at or nearest the owner, if there be but one, or if more than one, nearest the place where the husband or the acting and managing owner usually resides, and also the provision for the recording of bills of sales, mortgages, and conveyances in the office of

the collector of customs where the vessel is registered or enrolled, and observed:

“These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered and which must be the nearest to the place where the owner or owners reside.”

In speaking of the vessels it was said:

“They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states. . . . Besides, whether the vessel, leaving her home port for trade and commerce, visits in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port.”

Again, in *Morgan v. Parham*, 16 Wall. 471, the facts were that a vessel, the *Frances*, was brought to Mobile, Alabama, which was duly registered at the port of New York, under the ownership of the plaintiff, according to the acts of congress. The plaintiff was, and had since remained, a citizen of New York, and the vessel was the

property of the plaintiff. The vessel was assessed as personal property in the city of Mobile. The tax remaining unpaid, the vessel was seized by the collector of the city. The owner brought an action for trespass against the collector for such seizure, and the collector justified by virtue of his tax warrant. The vessel was brought to Mobile in 1865. From that time until 1870 it had been employed as a coasting steamer between Mobile and New Orleans. In January, 1867, the vessel was regularly enrolled at the custom house by her master as a coaster, and license was issued in 1868 and 1869 as a coaster, and the Frances was one among several of a daily line of steamers plying between Mobile and New Orleans. The captain of the vessel was a resident of Mobile, and the agent conducting the business of the vessel at Mobile was resident there, occupying an office for such business, and paid the persons who assisted him, but was under the control of his superior agent, residing in New Orleans, who employed and paid the captain. A wharf and office in Mobile were occupied for the use of the vessels. They transported the mails, freight, and passengers between Mobile and New Orleans. The court held the tax was invalid, and said:

“The fact that the vessel was physically within the limits of the city of Mobile, at the time the tax was levied, does not decide the question. Thus, if a traveler on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these persons would be subject to taxation as property within the city. It is conceded by the respective counsel that it would not have been. On the other hand this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat or a post-coach engaged in a local business within a state may be subject to local taxation, although it carry the

mail of the United States. The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. It is not, therefore, upon this principle that we are to decide the case. . . . The imposition in this class of cases was a tax upon the use of the public waters of the country, and tended immediately to interfere with and to obstruct the commerce between the states. In the instance before us the tax was upon a vessel at the wharf. It was in this respect as if a tax had been laid upon lumber or cotton lying on the dock at Mobile. This vessel was owned by and employed in the service of a resident of the state of New York. It was primarily and presumptively taxable under the authority of that state, and of that state only.”

And again the court concludes:

“It is the opinion of the court that the state of Alabama and no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only, and that it was engaged in lawful commerce between the states with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value.”

It is also said that it was immaterial whether the steamer, the *Frances*, was actually taxed in New York or not; she was liable to taxation there.

Again, in *Moran v. New Orleans*, 112 U. S. 69 (5 Sup. Ct. 38), a municipal ordinance of the city of New Orleans to establish the rate of license for professions, callings, and other business, which assessed and directed to be collected from persons owning and running towboats to and from the Gulf of Mexico and the city of New Orleans was adjudged to be a regulation of commerce among the states and invalid. It will be observed that the first two cases seem to put the invalidity of the tax upon the ground of an interference with commerce among the

states, the regulation of which is exclusively with congress; and in each instance the vessels were engaged in interstate commerce, and were only temporarily in the ports where the tax was attempted to be levied. We have been unable to find any adjudication of the supreme court of the United States specifically determining that the registry of the vessel conclusively fixes its *situs*. The registry is presumptive evidence of such *situs*. Counsel have, however, referred us to an authority (*Roberts v. Township of Charlevoix*, 60 Mich. 197, 26 N. W. 878), which seems to determine that a vessel enrolled, licensed, or registered under the United States navigation laws does not, by engaging in business within a state, become subject to its taxing power if the owner is a non-resident. Again, in the case of *Johnson v. DeBary-Baya Merchants' Line*, 37 Fla. 499 (19 South. 640, 37 L. R. A. 518), the facts were that the vessel was owned by a corporation of New York, with its headquarters and chief office in the city of New York, and was duly registered in the custom house at that port, and a tax had been regularly levied upon it in New York. The New York corporation maintained a line of boats on St. John's river for a portion of the year, engaged in the business incident to steamboats plying upon a river; but at different times the vessels went to any other waters which supported profitable engagements, and were engaged upon waters in other states. It was adjudged that the state of Florida could not levy a tax upon the vessels, the court observing:

“Under the admitted facts of this case we are of the opinion that the vessels of the appellee were not subject to taxation in Duval county. The vessels were owned by a New York corporation and had acquired a *situs* in that state by being duly registered in the port of New York,

the nearest to the residence of the owner, and were engaged in commerce in that state where, it is conceded, the most profitable employment could be procured for them. The mere fact of being employed in interstate commerce would not exempt them from taxation, and we do not say that registration in a foreign port and nonresident ownership should control absolutely, but such ownership and registration render them primarily and presumptively taxable only in their home port."

But in the well considered case of *National Dredging Co. v. State*, 99 Ala. 462 (12 South. 720), the facts were that the dredging company was a Delaware corporation, and the tugboat was registered at Wilmington, Delaware, and afterwards was in Mobile Bay for a long time, engaged in dredging in connection with other scows and machinery owned by the same company. The contract for dredging was with the government of the United States. The court observed of the tugboat Curtis:

" . . . a special consideration is advanced in support of its non-taxability. It is a sea-going vessel, propelled by steam, and is entitled to registry under statutes of the United States at the port of its owner's domicil. As a matter of fact, it is registered at the custom house in the city of Wilmington, Delaware. On this the contention is that that being home, it cannot be taxed elsewhere. There are many cases which hold that such vessel, engaged in commerce between its home port and others, or even wholly between other ports than that of its registry, can be taxed only at the port of registry. It is not our purpose to question these decisions; it is not necessary that we should. They all proceed upon the theory that vessels thus engaged are never in foreign jurisdiction except *temporarily*, and as an incident to the commerce to which they are devoted, and hence that they do not and cannot acquire a *situs* in foreign ports for the purposes of taxation; they do not become incorporated with the property of other states and countries which they touch intermittently, are never indefinitely there, and

their business, the work they perform, the uses to which they are put, is not done and performed within, and are not local to, the foreign state or country.”

And the court concludes:

“The question, indeed, is at last one of *situs* in fact, and where this is shown neither foreign registry nor foreign ownership is of any consequence.”

Sound reasons exist for the right of the state to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this state. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this state, personal property is taxed at its *situs*, and without reference to the residence of the owner.

We have examined the evidence in the record upon the exception made to the findings of the superior court and fully coincide with the findings. The evidence discloses that for from four to seven years the three tugs have been at Hoquiam, in Chehalis county; that their business has been towing in the waters of Gray's and Willapa Harbors in this state; that the corporation plaintiff, for some fifteen years last past, has owned and operated large saw mills, owns large areas of timber lands, and has manufactured from twenty to thirty million feet of lumber annually; that these tugs tow vessels usually from Hoquiam through the harbor to the ocean; that all contracts of towage are made by the captains of the respective tugs, who reside at Hoquiam; that the crews reside there; that the assistant secretary and manager of the company resides

there; that all accounts are rendered to him there; that the captains and crews are paid there, and the only absences of the tugs from these harbors shown by the record have been for the purpose of repairs. They appear to have been used for all these years as appurtenant to and a part of, the lumbering plant and business of the plaintiff in Chehalis county. Upon these facts, we conclude that the *situs* in fact of the three tugs is in Chehalis county, and that there was a valid assessment levied upon their value. The objection to the assessment upon the pipe lines and reservoirs has been considered, and we are not inclined to disturb the conclusion of the superior court upon such assessment. We do not think the objection to the right of the officer who made the assessment to his office can be made here. The record shows that he was certainly a *de facto* assessor, exercising properly all the functions of the office.

The judgment is affirmed.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

April, 1901.]

Opinion Per Curiam.

[No. 8359. Decided April 30, 1901.]

S. P. FLYNN, *Appellant*, v. JACOB FURTH, *as Receiver, Respondent*.

RECEIVERS — ACTION AGAINST TO ENFORCE LIABILITIES INCURRED BEFORE APPOINTMENT.

A contract liability of a partnership, incurred prior to the appointment of a receiver of the firm's business and property, cannot be enforced by action against the receiver alone.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Ballinger, Ronald & Battle, for appellant.

Bausman, Kelleher & Emory, for respondent.

PER CURIAM.—In December, 1893, and for some time prior thereto, Alfred Mosher, Sr., Alfred Mosher, Jr., and W. A. McDonald composed a partnership doing business under the firm name and style of Mosher & McDonald. The business of the firm was mainly confined to logging in the state of Washington, and was conducted upon a somewhat extensive scale. The two Moshers resided at Bay City, in the state of Michigan; and McDonald, the remaining member of the firm, resided in the state of Washington, and was charged with the immediate management and control of the details of the firm's business,—the principal business office of the firm being located in the city of Seattle, in said state. The Moshers were men of reputed wealth; they were, at least, able to control large amounts of capital in connection with the logging business of the firm of Mosher & McDonald in the state of Washington, as well as in other extensive logging and lumbering operations of their own in the state of Michigan. Their investment in the business of the firm of Mosher

& McDonald amounted at that time to about half a million dollars. The Mosheres, feeling that they had large investments in the state of Washington, and not being entirely satisfied with the development of the business, because of increased obligations of the firm of Mosher & McDonald, in the month of December, 1893, desired the appellant, S. P. Flynn, to accept the employment of said firm for purposes then agreed upon. Appellant was then a resident of the state of Michigan, a lawyer by profession, but had theretofore had experience in logging and lumbering operations, and was a man of general business qualifications. In view of these qualifications, the Mosheres requested appellant to come to the state of Washington under the employment of the firm of Mosher & McDonald and make a general investigation of the business of said firm; and particularly did they desire him to negotiate with the holders of the firm obligations for extensions of time, and otherwise endeavor to enlarge the credit and improve the general condition of the firm's business. It was understood and agreed that appellant should continue in such employ for a period not exceeding six months, and meanwhile would determine if he desired to join said partnership as a member thereof. It was agreed that appellant should be paid by said firm a sum sufficient to pay his traveling expenses, and a reasonable compensation for his services in addition thereto; no definite amount being agreed upon for his services. In pursuance of such arrangement, appellant came to this state in the latter part of December, 1893, and immediately thereafter entered upon the duties of such employment. He continued in such employment until on or about the 24th day of April, 1894, when he returned to Bay City, Michigan, and there submitted a report of his doings and of the general condition of the business of Mosher & McDonald. All the

April, 1901.]

Opinion Per Curiam.

members of said firm were present at the time of the submission of said report, and it was then agreed between them and appellant that appellant should return to the state of Washington under a future employment, and should continue to discharge similar duties to those theretofore discharged by him for the firm. Appellant claims that he was to receive under such new arrangement compensation at the rate of \$3,000 per year, as a fixed amount, together with the traveling expenses of himself and family, and in addition thereto one-fourth of the net profits of the business of the firm. This arrangement continued until January 1, 1895, when it was renewed and extended until January 1, 1896. During the period of the last named employment, to-wit, on the 9th day of October, 1895, the said McDonald commenced a suit in the superior court of King county, Washington, against his partners, Alfred Mosher, Sr., and Alfred Mosher, Jr., and, among other things, sought the appointment of a receiver of the business, property, and effects of the firm of Mosher & McDonald; and thereafter, on the 29th day of February, 1896, Jacob Furth, the respondent herein, was appointed such receiver, and has ever since been, and now is, the duly appointed and acting receiver of the property and effects of said firm. Thereafter the appellant herein instituted this action against the respondent as such receiver, and seeks to recover for balances which he claims are unpaid for his services rendered the firm of Mosher & McDonald under his several employments above mentioned. The third amended complaint consists of seven causes of action in which the grounds of recovery heretofore stated are recited, together with other grounds alleged, and the complaint concludes with a demand for judgment in the sum of \$100,000. On motion of the receiver, the fourth cause of action was by the court strick-

en from the third amended complaint, and thereupon a demurrer was by him interposed to the remaining causes of action, on the ground (1) that there is a defect of parties defendant, in that the members of the firm of Mosher & McDonald are not made parties; and (2) that the several causes of action do not state facts sufficient to constitute causes of action against the respondent. The court overruled the demurrer to the first, second, and third causes of action, and sustained it as to the fifth, sixth, and seventh causes of action. The respondent's counsel duly excepted to the order overruling the demurrer as to the first, second, and third causes of action, and the appellant's counsel likewise excepted to the sustaining of same as to the other causes. That portion of the third amended complaint not stricken upon motion or ruled out upon demurrer covered the several contracts above stated. Thereupon the respondent answered and alleged, among other things, that appellant had been fully paid for his said services. A trial was had before a jury, and, after the evidence of both parties had been heard, the respondent's counsel challenged the legal sufficiency of the evidence, which challenge was by the court sustained. Thereupon the court discharged the jury and entered judgment for the respondent, dismissing the cause. From said judgment this appeal is prosecuted.

Many assignments of error are urged by appellant, chief of which is that the court erred in sustaining respondent's challenge to the evidence, and in taking the cause from the jury. We do not, however, deem it necessary to discuss the various assignments of error, for the reason that we believe an analysis of the one above mentioned must determine this case. We believe the court erred in overruling respondent's demurrer to the complaint. The claims sought to be established were based

April, 1901.]

Opinion Per Curiam.

upon contracts made between appellant and the firm of Mosher & McDonald long before the appointment of respondent as receiver of said firm. The receiver alone is sued in this action; the members of the partnership are not made parties. The suit is based upon an alleged personal liability of said firm. The members of the firm are certainly not bound by this proceeding. Neither is this suit a bar to another action directly against the members of the partnership. The receiver is the holder of the property and effects of the partnership pending the determination of the action in which he was appointed, and subject to the direction of the court. But he is not called upon to defend suits which can only be determined when the partners who are primarily liable are brought into court. Even if the receiver should be deemed a proper party, the demurrer should have been sustained on the ground of defect of parties defendant; for under no principle do we conceive that the matters involved could be finally determined without the joinder of the partners upon whose liability, if any exists, a judgment must be finally entered.

In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the receiver is not a proper party. *Northern Pacific R. Co. v. Heflin*, 83 Fed. 93.

The opinion in the above case, on page 94, states:

“Even in respect to contracts entered into by the corporation prior to the receivership, the rule seems to be settled that receivers are not liable thereon unless they adopt or ratify such contract.”

A number of cases are cited in support of the above statement.

“The circuit court below seems to have been of opinion that, wherever a receiver is appointed over the property

of a debtor, the appointment instantly abates all personal actions pending against him, and vests all the rights of all his creditors in the receiver, who thereafter alone has authority to bring suits to enforce them, without regard to the character of those rights. A receiver is merely an officer of the court appointing him, to hold possession of property until the rights of the parties to the suit in which he is appointed can be determined. He represents neither of the parties to the suit, nor any one else, and has only such powers as the court may confer upon him. And in reference to the actions already begun, as in this case, the receiver has no status in court until he has made himself a party upon an application made by him." *Wiley v. New Orleans*, 87 Fed. 843, 848.

The same principle is generally discussed and sustained in the case of *Decker v. Gardner*, 124 N. Y. 334 (26 N. E. 814, 11 L. R. A. 480):

"The complaint does not ask any judgment against the trust company, or show any reason for making it a party to the suit, beyond the mere statement that it has been appointed receiver of the Suffolk Bank. It may be that the rights and obligations flowing from this make it proper or necessary to sue the receiver with, or instead of the bank, but there must be some right to relief from the receiver stated, and some relief prayed. The mere fact that A. is the assignee or the receiver of B., whether these be natural or artificial persons, will not justify a creditor of B., in bringing A. as a party into every suit against B., or where the rights and the remedies of the plaintiff, so far as appears, end with B., and the assignee or receiver is not to be affected by the suit, nor to be adjudged or compelled to do anything for the relief of the plaintiff. I do not see that the plaintiff here shows any right to maintain this action against the trust company, or that he can be permitted to sue that company and put it to a defense, when no claim whatever is made against it. This is not an action affecting real estate, in which the trust company has an interest that is to be foreclosed. It is simply an action on a money demand, and no demand

April, 1901.]

Opinion Per Curiam.

is made, or cause of action shown, against the trust company. As to the company, the complaint should have been dismissed." *Arnold v. Suffolk Bank*, 27 Barb. 424, 426.

The above authorities go to the extent of holding that a receiver, under the circumstances of this case, is not a proper party. In *Denny v. Cole*, 22 Wash. 372 (61 Pac. 38, 79 Am. Rep. 940), a partnership had pledged certain shares of stock which belonged to the firm, and a receiver was afterwards appointed for the partnership; and it was held that in an action to foreclose the lien of the pledgee, the receiver was a necessary party, in connection with the partners themselves. The rule there announced is undoubtedly correct, where it is sought to enforce any kind of lien against specific property, either real or personal. The receiver has such an interest in all the property of the partnership as makes it necessary that he should in such a case be made a party by reason of his successorship to the equity of redemption, and to any surplus of purchase money realized at the lien sale. But even in that case, the partners are necessary co-parties with the receiver. Here it is sought to enforce a bare unliquidated claim arising out of a partnership contract before the appointment of a receiver, and we do not see that the receiver has any interest in it until the claim may have been first adjudicated as a liability of the partnership; and then his duty would be simply to see that a judgment thereon shares *pro rata* with other claims from the property of the partnership, when the claim has been properly presented to him. He should not be put to the trouble and expense of defending such an action unless he believes it to be to the interest of creditors that he shall do so, in which case we have no doubt that he might intervene under our statute. In *Denny v. Cole*, *supra*, (page 378), the court uses the following language:

“It would seem to be hard to reconcile these principles with the doctrine that a receiver is only the custodian of the property involved in the receivership, and we think it must be held that he has such a special property therein as to make him the representative of the rights of the partners in all actions or proceedings affecting the property, and as such entitled to notice in all cases where the partners would have been entitled to notice had there been no receiver.”

The above statement, however, relates only to the class of cases then under consideration, viz., all cases “affecting the property,” as in the case of liens and mortgages.

For these reasons, we think the demurrer to the complaint should have been sustained; and inasmuch as the action of the lower court in sustaining the challenge to the legal sufficiency of the evidence, and in entering judgment of dismissal, effected the same result as a judgment upon the demurrer, the judgment is affirmed.

[No. 3379. Decided April 30, 1901.]

JOHN R. OWENS, *Respondent*, v. FRANK W. SWANTON *et al.*, *Appellants*.

LANDLORD AND TENANT — FORCIBLE ENTRY AND DETAINER — COUNTER-CLAIM FOR DAMAGES.

In an action of forcible entry and detainer, the defendants cannot, by way of cross complaint, set up a claim for damages by reason of the wrongful issuance of the writ of restitution, but are relegated to an action on the bond given by plaintiff to secure such writ.

SAME — UNAUTHORIZED LEASE BY AGENT — RATIFICATION.

The acceptance by the owner from a tenant of rental stipulated for in a lease made by an agent having no express authority therefor, does not amount to a ratification of the full terms of the lease, where the tenant was immediately notified of the

April, 1901.]

Opinion Per Curiam.

repudiation of the lease and that he could remain in possession only under a monthly tenancy.

SAME — EVIDENCE.

The refusal of the court to admit in evidence, in an action of unlawful detainer, a lease purporting to be executed by an agent of plaintiff is proper, where there is no proof of the agent's authority nor of the subsequent ratification by the principal.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Burke, Shepard & McGilvra, for appellants.

White, Munday & Fulton, for respondent.

PER CURIAM.—The respondent, John R. Owens, in the month of September, 1897, was the owner of a certain brick block known as "No. 109 Second Avenue South," in the city of Seattle, and more particularly described in the complaint. He avers that during said month he leased the three upper floors of said building to Lucien Blum and Marie Blum, his wife, for an indefinite time, with monthly rental reserved, beginning on the 15th day of said month; and that the periods for which rent was payable began on the 15th day of each month, and ended on the 15th day of the succeeding month. On the 14th day of January, 1898, respondent, for the purpose of terminating said tenancy, caused to be served upon the said Blum and wife a notice in writing by the terms of which they were notified to quit, and deliver to respondent the possession of the premises, at the expiration of that month of said tenancy which commenced on the 15th day of January, 1898, and ended on the 15th day of February, 1898. The said Blum and wife did not comply with the terms of said notice, but, after the service thereof, delivered possession of the premises to Frank W. Swanton and James H. Laurance, the appellants in this action. Appellants

continued in such possession until dispossessed by a writ of restitution issued in this action, which was brought against them by respondent under the forcible entry and detainer statute to regain possession of the premises. The complaint alleges that the reasonable value of the use and occupation of the premises was \$200 per month, and that respondent has been damaged in the sum of \$1,000 over and above the reasonable rental value of the premises. Appellants, in their second amended answer, allege that on the 8th day of September, 1897, the respondent did, by written instrument, lease the said premises to said Blum and wife for the term of eighteen months from and after the 15th day of September, 1897, at a monthly rental of \$50 per month, payable monthly in advance, and that on the 18th day of January, 1898, said Blum and wife duly assigned said lease to the appellants, who thereupon went into possession of the premises, and so continued in possession until the 23d day of March, 1898, when they were dispossessed by respondent through the writ of restitution issued in this cause. Appellants further aver, by way of cross complaint, that the writ of restitution was wrongfully procured, and that respondent, in taking possession of the premises, had also taken possession of certain furniture and fixtures of the appellants of the value of \$1,000, and converted the same to his own use. It is also averred that appellants have been damaged in the said sum of \$1,000, and in the further sum of \$2,500, by the wrongful issuance of said writ, and the loss of the use and possession of said premises and the breaking up of their business, and they demand judgment against respondent in the sum of \$3,500. Respondent interposed a demurrer to said cross complaint upon the grounds: (1) That it appears upon the face thereof that the court has no jurisdiction over the subject matter of said cross complaint in

April, 1901.]

Opinion Per Curiam.

this action; and (2) that said cross complaint does not state facts sufficient to constitute a defense or counterclaim or cross complaint. The court sustained the demurrer, and appellant's counsel duly excepted. The reply denies the material affirmative allegations of the answer. A trial was had before a jury, and, when the evidence had all been introduced, the legal sufficiency of the appellants' evidence was challenged, and said challenge was by the court sustained. The court found the facts as set forth in respondent's complaint, and decided as a matter of law that a verdict should be found by the jury in favor of respondent for the possession of said premises and for the sum of \$253, the value of the use and occupation of said premises from the 15th day of February, 1898, to the 23d day of March, 1898; and thereupon the court discharged the jury from further consideration of the case, and directed judgment to be entered in accordance with its said decision. Judgment was accordingly entered awarding to respondent the possession of the premises and for the sum of \$506 against appellants, being double the amount of the value of the use and occupation of the premises by appellants. A motion by appellants for a new trial was overruled.

The first assignment of error is that the court erred in sustaining the demurrer to the cross complaint and claim for damages in the answer. This point seems to have been clearly decided by this court adversely to the appellants' contention in the following cases. *Ralph v. Lomer*, 3 Wash. 401 (28 Pac. 760); *Phillips v. Port Townsend Lodge*, 8 Wash. 529 (36 Pac. 476). Appellants' counsel, in their brief, ask the following question: "Shall they [appellants] be driven to a separate action on respondent's bond, and, if so, why?" We think that is their remedy. The forcible entry and detainer statute provides that

such a bond, with two or more sureties, shall be given before any writ shall issue prior to judgment, and shall be conditioned "that the plaintiff will prosecute his action without delay, and pay all costs that may be adjudged to the defendant, and *all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.*" To secure safety and security in the matter of this bond, the statute further provides that an application may be made to the court for additional sureties. Bal. Code, § 5536. It may be argued that a defendant in a forcible entry and detainer action may waive his claim against the sureties upon the bond, and seek recovery against the plaintiff alone, and that in such event he may set up his claim for damages by way of cross complaint in the original action. But, in any event, we believe the following language of this court in *Phillips v. Port Townsend Lodge, supra*, is the better interpretation of the law. At page 533 of the opinion the court says:

"The very object the legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. . . . In such proceedings counterclaims and offsets are not available."

A number of cases from other jurisdictions are there cited. We think the court did not err in sustaining the demurrer to the cross complaint.

The only other error assigned is the refusal of the court to admit in evidence certain papers marked as defendants' exhibits. It appears that the respondent was at the time of the matter complained of a non-resident of this state, and, being the owner of the property in question, had placed

April, 1901.]

Opinion Per Curiam.

it in charge of his brother, H. K. Owens, who had deputized one Frank B. Wiestling to collect rents, procure tenants, and otherwise look after the property. At a time when said H. K. Owens was away from the city of Seattle, to-wit, on or about the 8th day of September, 1897, the said Wiestling executed, together with said Blum and wife, what purports to be a written lease for said premises for the period of eighteen months from and after the 15th day of September, 1897, at the monthly rental of \$50 per month. Said instrument, in addition to the signatures of the Blums, is signed, "John R. Owens, by F. B. Wiestling, his agent." At the trial, appellants offered this written instrument in evidence, together with the purported assignment thereof to them, in support of their contention that they were lawfully in possession of the premises by virtue of the terms of such instrument. Objection was made to the introduction of the so-called lease upon several grounds, some of which were for irregularities appearing upon the face of the instrument itself. But the most serious objection was that no authority was shown for Wiestling to execute the instrument in behalf of respondent. The court sustained the objection, and refused to admit the offered evidence. It appears from the evidence that Wiestling, who testified at the trial, never had any direct communication with respondent, and any authority he may have had in the premises he derived through the aforesaid brother of respondent, the said H. K. Owens. Wiestling does not claim that he had specific authority to execute this lease, but claims to have acted under what he understood to be a general authority to look after the leasing of this property. He testified that upon the return of H. K. Owens to Seattle he showed him this written instrument, and that Owens made no objection to it. In this particular Owens contradicts him. Upon this point Owens testified as follows:

"I was very much surprised to learn that he had given a lease because I had written him particularly not to make a lease, at the prevailing low rates of rent at that time, because the Klondike excitement had caused an increase in business here, and rents were advancing, and I criticized his giving the lease. I told him I could not sustain it. I told him he had no authority to give the lease. And he said 'Well, he had general authority to do the best he could in renting it.' And I told him that I would permit the tenant to stay there as a month to month tenant, but I would notify him that the lease was invalid, and at the proper time I would take steps to cancel the lease or retake possession."

This was about the first or second day of October, 1897, —less than a month after the execution of the so-called lease. Whatever may have occurred between Owens and Wiestling at that time, however, Owens testifies that the next day he notified Blum that the lease Wiestling had given was invalid, and that he (Blum) was only a month to month tenant. Later, about the middle of the same month, he notified the Blums in writing to the same effect. This evidence is uncontradicted. Thereafter the Blums paid rent monthly at the rate of \$50 per month until notified that respondent desired to terminate their tenancy as aforesaid. It is contended by appellants that the acceptance of rent at the same rate named in the written instrument amounts to a ratification of the terms of the lease, even though it may have been unauthorized in its inception. We think not, under the circumstances shown in the evidence. The Blums were plainly told by Owens, almost immediately upon his discovery that such a paper had been signed by Wiestling, that it was without authority, and that they could remain as tenants from month to month only. They continued thereafter to pay monthly rent until notified in a proper manner for the termination of a month to month tenancy. Acceptance of rent under

May, 1901.]

Syllabus.

those circumstances cannot be held to be a ratification of the act of Wiestling. We think, therefore, that sufficient foundation was not laid for the introduction of the offered exhibit, and the court properly excluded it.

Having thus disposed of the so-called lease itself, the purported assignment thereof was likewise incompetent.

Since we find no error in the record, the judgment is affirmed.

[No. 3569. Decided May 1, 1901.]

GEORGE L. ROSE, *Respondent*, v. PIERCE COUNTY *et al.*,
Appellants.

CLAIM AGAINST COUNTY — PRESENTATION — WAIVER OF OBJECTION.

The objection that plaintiff failed to present his claim against the county to the board of county commissioners for allowance or rejection, prior to bringing action thereon, as the statute requires, cannot be raised for the first time on appeal, but, when not urged in the trial court, will be presumed to have been waived by the county.

CONVERSION — SALE OF PROPERTY FOR ILLEGAL TAXES — LIABILITY OF COUNTY AND OFFICERS.

Where a county treasurer, in an action in his own name and in that of the county to enforce the collection of a tax upon a stock of merchandise, procures the appointment of a receiver, whose actions he directs and controls, both the county and the treasurer are liable for all damages suffered by the defendant therein, by reason of the void and illegal acts of the receiver.

Appeal from Superior Court, Pierce County.—Hon.
JAMES A. WILLIAMSON, Judge. Affirmed.

Fremont Campbell, Prosecuting Attorney, for appellants.

H. G. Rowland and *Sullivan & Christian*, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an action of conversion. The respondent, who was plaintiff below, alleged in his complaint that on the 1st day of March, 1897, he was the owner and in possession of certain personal property, consisting of a stock of drugs, medicines, proprietary articles, toilet articles, and various other goods used in the drug trade, and that on the day named the appellants unlawfully and wrongfully seized the same and converted them to their own use, to his damage in a sum named. A motion to make the complaint more definite and certain was filed by the appellants, which being overruled, they answered separately, denying the allegations of the complaint and setting up affirmatively that the property was seized for taxes assessed against one E. C. Merrill, and that it was seized and sold for the purpose of procuring funds with which to satisfy such taxes. The reply was a general denial of the new matter contained in the answer. On the issues thus made a trial was had, resulting in a judgment in favor of the respondent.

The appellants rely for reversal mainly on the fact that the record fails to disclose that the claim sued upon was ever presented to the board of county commissioners for allowance or rejection. They contend that without such presentation the action cannot be maintained, and that the question can be raised at any stage of the proceedings. In support of this they cite, *Collins v. King County*, 1 Wash. T. 416, and *Hoexter v. Judson*, 21 Wash. 646 (59 Pac. 498.) In each of these cases, however, the objection here sought to be raised was taken in the trial court; in the first, by a demurrer to the complaint, specifically pointing out the objection; and in the second, by a motion for nonsuit made at the conclusion of plaintiff's case. In the case before us the question now urged was not suggested in the

May, 1901.] Opinion of the Court—FULLERTON, J.

trial court, but is raised here for the first time. This being so, we are of the opinion that the objection comes too late. In *Neis v. Farquharson*, 9 Wash. 508 (37 Pac. 697), we held that the objection that there was no proof that the plaintiffs ever presented their demand or claim to the administrator for allowance or rejection, as they were required to do by the statute, could not be taken for the first time in the appellate court. In principle, there would seem to be no difference between that case and the case at bar. The statute makes it a condition precedent to the right to maintain an action against an administrator that the claim be first presented to him for allowance or rejection; and if the administrator waives this requirement of the statute, by failing to make the objection in the trial court, it must be a waiver on the part of the county to fail to object in that court that the claim sued on has not been presented to its board of commissioners. The purpose of the rule is to give the claimant an opportunity to supply the requisite pleadings or proof, as the case may require, which he cannot do if the objection is made for the first time on appeal. As bearing upon this point see the following cases: *Nye v. Kelly*, 19 Wash. 73 (52 Pac. 528); *Fitzgerald v. School District*, 5 Wash. 112-114 (31 Pac. 427); *Bank of Stockton v. Howland*, 42 Cal. 129; *Drake v. Foster*, 52 Cal. 225; *Sheel v. Appleton*, 49 Wis. 125 (5 N. W. 27); *Benton v. Milwaukee*, 50 Wis. 368 (7 N. W. 241); *Clarke v. Lyon County*, 8 Nev. 181.

The evidence disclosed that a portion of the goods described in the complaint had been sold by a receiver appointed in a suit brought by the appellants against the respondent, Rose, the said E. C. Merrill, and one McLaughlin, to recover certain taxes alleged to be due the county of Pierce by Rose and Merrill. The judgment entered in this suit was reversed by this court, and the suit

ordered dismissed. It is urged that the appellants cannot be held responsible for the acts of the receiver, and that the court erred in instructing the jury that the receiver's acts were unauthorized in law and wholly void; that his acts were in law the acts of the appellants, and that they are responsible to the respondent for them. We find no error in this instruction. The uncontradicted evidence abundantly shows that the appellant, Judson, as treasurer, together with other officers of the county, instituted the action, directed and controlled the acts of the receiver, and actively participated in all of the proceedings. These acts, being without authority of law, rendered the county, and the officers actively participating therein, liable to answer to the respondent for all damages suffered by him because of such acts. *Hoexter v. Judson*, 21 Wash. 646 (59 Pac. 498).

Errors are also assigned to the rulings of the court in the admission and exclusion of certain evidence. But an examination of the record fails to convince us that they are of sufficient merit to warrant a reversal of the case.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 3717. Decided May 2, 1901.]

THE STATE OF WASHINGTON OF THE RELATION OF T. N. HENRY, *Respondent*, v. JOHN MACDONALD *et ux.*, *Appellants*.

SCHOOLS — COMPULSORY EDUCATION — REFUSAL TO PLACE CHILD IN SCHOOL — CONTEMPT OF COURT.

Under the school law of 1897, as amended in 1899, which provides that it shall be the duty of parents and guardians of children between the ages of eight and fifteen years to send them to school at least three months in each year; that any parent

May, 1901.] Opinion of the Court—REAVIS, C. J.

or guardian who, after notification by the county superintendent, refuses or neglects to send such child to school, shall, upon complaint of such superintendent, be summoned before the judge, who shall have power to issue an order commanding the parents to place the child in school, or appear before him and show cause for refusal so to do; and that any person summoned before a superior judge to answer why he has not kept such child in school, who fails to give satisfactory cause for refusal to comply with the law relating to school attendance, shall be guilty of a misdemeanor and fined; no authority is vested in the superior judge to adjudge such parent or guardian guilty of contempt for failure to comply with an order to place a child in school, since the only penalty the statute imposes is to declare the offense a misdemeanor punishable by fine.

SAME — PENALTY — NOT EMBRACED IN TITLE OF ACT.

Under § 19, art. 2, which provides that no bill for an act of the legislature shall embrace more than one subject, which must be expressed in the title, a section in the school law defining a misdemeanor and providing for its punishment is illegally embraced within an act entitled "an act to establish a general and uniform system of public schools in the state of Washington."

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Reversed.

Charles D. King, for appellants.

George H. Funk, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Upon the complaint of the county school superintendent, citation was issued from the superior court of Thurston county to appellants, Macdonald and wife, to show cause why they did not send their three minor children to the common school in the district in which appellants resided, and also commanding appellants to bring the three children into court for examination as to their proficiency in the course of education prescribed in the common schools. Thereafter, upon hearing, an examination was had of the proficiency of the children and of the reason

of the parents for not sending them to school, and the court peremptorily ordered appellants to send the children to the school in session in the district. Thereafter, upon failure of the appellants to comply with such order, they were held as for a contempt and punished by a fine of \$20 each; and the order directed that, in default of the payment of such fine, the appellants should stand committed to the custody of the sheriff of Thurston county until such fine be paid or they discharged in pursuance of law. The court also entered a judgment against defendants for the costs of the entire proceedings. These proceedings were taken under § 71, 171 and 177, of the school law, as amended by § 25 of the act of March 15, 1899. The principal act is entitled, "An act to establish a general, uniform system of public schools in the state of Washington, and repealing" various school laws theretofore existing, approved March 19, 1897 (Laws 1897, p. 356). Section 71 of the principal act (Laws 1897, p. 385) imposes the duty on all parents, guardians and other persons having immediate custody of any child or children between the ages of eight and fifteen years to send them to school at least three months in each year. Section 171 of the principal act (Laws 1897, p. 424), declares, in substance, that any person summoned before a superior judge to answer why he has not kept children under his care in school as provided in the law relating to school attendance, and failing to give satisfactory cause for his refusal to comply with the law, shall be guilty of a misdemeanor and fined in the sum of not less than ten nor more than twenty-five dollars for each offense. Section 177 of the principal act, as amended in 1899 (Laws 1899, p. 324), declares that any parent or guardian who, after being notified by the county school superintendent of the provisions of the law, shall further refuse or neglect to send such child to school, shall,

May, 1901.] Opinion of the Court—REAVIS, C. J.

upon complaint of the superintendent, be summoned before the judge, who shall have power, if the child be under the care of a parent or parents, to summon the child or children and parents before him, and, if he shall find upon inquiry that the child has not already attained a reasonable proficiency in the common-school branches for the first eight years of study in the common schools, the judge shall issue an order commanding the parent or parents to place the child in school, or appear before him and show cause for the neglect or refusal so to do.

The only question deemed material here is the power of the judge or court to inflict the judgment for contempt which was entered against appellants. The three sections mentioned are all from the general school law that seem pertinent to the inquiry. These sections, taken together, are somewhat vague in their meaning, and it is difficult to determine the intention of the legislature. They are found, as arranged in the act, numbered widely apart, but evidently all relate to the same subject matter, viz., the compulsory education of children where for any cause such education is neglected. Section 71 imposes the duty primarily upon the parents, guardians, and other persons having immediate custody of the children. Section 171 provides that any one summoned before the superior judge who does not show satisfactory cause for refusal or neglect to comply with the duty imposed by the law shall be guilty of a misdemeanor and punished for each offense in a sum of not less than ten nor more than twenty-five dollars. Section 177, as amended, should logically precede in its order § 171, because § 177 declares the procedure by which any one having the custody of a child, and who does not comply with the school law, shall be brought before the judge of the superior court for an examination and hearing, and prescribes further that the

judge, if the answer be unsatisfactory, shall command the person to place the child in school; but the penalty for the violation of the order of the judge is clearly prescribed in § 171; that is, such violation of duty is denounced as a misdemeanor. It is evident the intention of the legislature was to enforce the duty imposed upon a person having the custody of the child to comply with the law by the penalty prescribed in § 171, and no power is specifically given to the judge of the superior court to punish the violation of the order authorized in § 177 by contempt. It may be safely assumed that no such power to punish by contempt exists at common law, and the statute does not attempt to give such authority. But the vice of § 171 is that it is not, and cannot be, included within the title of the act. As will be observed, the title is, "An act to establish a general and uniform system of public schools in the state of Washington," etc. Section 19, art. 2, of the constitution declares: "No bill shall embrace more than one subject, and that shall be expressed in the title." It is apparent that a crime cannot be defined and punished under the above title to the school law. *Percival v. Cowychee Irrigation, etc., District*, 15 Wash. 480 (46 Pac. 1035).

We are unable to find any authority in law for the imposition of the judgment of contempt. The judgment is reversed, with direction to dismiss the proceeding.

DUNBAR, FULLERTON, ANDERS and WHITE, JJ., concur.

May, 1901.]

Opinion Per Curiam.

[No. 3393. Decided May 3, 1901.]

LAURA M. LAURIE *et vir*, Respondents, v. CITY OF BALLARD, Appellant.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — ACTION FOR INJURIES — EVIDENCE OF OTHER DEFECTS.

25	127
30	438
31	876
31	877
31	884

In an action to recover for personal injuries caused by the defective condition of a sidewalk, evidence of other defects in the same sidewalk of long standing and in close proximity to the defect which was the actual cause of the injury is admissible for the purpose of showing notice to the city of the general defective condition of the street, and as tending to show notice of the particular defect involved.

SAME — NEGLIGENCE — CONSTRUCTIVE NOTICE OF DEFECT — QUESTION FOR JURY.

The question of whether a city was constructively charged with notice of a defect in a sidewalk, whereby plaintiff was injured, was properly submitted to the jury, when it appeared from the evidence that the defect had existed for a period variously estimated by witnesses at from three to seven days, that the street was a much traveled one by reason of the vicinity of a school building and several churches, and that the walk at the point where the injury occurred was elevated on stringers some ten or twelve inches above the ground, and was used for a crossing for teams, for which purpose there had been constructed and in existence for a long time an approach for a wagon driveway.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Ivan L. Hyland and Piles, Donworth & Howe, for appellant.

Davis & Gilmore and Ballinger, Ronald & Battle, for respondents.

PER CURIAM.—Respondents are husband and wife, and as such they jointly instituted this suit to recover on account of injuries alleged to have been received by the

wife, Laura M. Laurie. On the 10th day of November, 1898, respondents resided in the city of Ballard, and about half past eight o'clock in the evening of said day Mrs. Laurie, while walking over the sidewalk along Tallman avenue, a public street in said city, stepped through a hole in the sidewalk and fell in such a manner that it is claimed she received therefrom serious and probably permanent injuries. The hole had been made by the breaking of a plank in the sidewalk. The evening was dark and there were no guards or signals at or near said broken plank and hole. It is claimed that Mrs. Laurie fell down upon and against the sidewalk with great violence, and that by reason thereof her left foot was sprained and her left hip bruised; that her left eye and ear were bruised and permanently injured; and that she was seriously and permanently injured internally. Mrs. Laurie, for some time prior to said accident, had been engaged in the management of an employment agency in the city of Ballard. It is claimed that respondents are damaged in the sum of \$600 for the loss of Mrs. Laurie's time and labor, \$810 for the husband's time and that of other nurses in nursing and caring for the wife, \$500 for medicines and medical attendance, together with general damages for injuries in body and mind; making a total of \$15,000, for which sum respondents ask judgment. A trial was had before a jury, and, when the evidence had all been introduced, appellant's counsel challenged the sufficiency of the evidence and moved the court that the case be withdrawn from the jury and judgment rendered for appellant. The challenge and motion were denied, and the court thereupon submitted the case to the jury under instructions. A verdict was returned in favor of respondents in the sum of \$1,887.50, and judgment was thereafter rendered

May, 1901.]

Opinion Per Curiam.

against appellant for that sum. A new trial was not asked in the lower court, and it is not asked here.

Appellant assigns as error: (1) The refusal of the court to sustain its challenge to the sufficiency of the evidence, and its motion that the case be withdrawn from the jury and judgment rendered for the defendant; (2) the refusal of the court to instruct the jury to render a verdict for defendant, as requested by the defendant; (3) the ruling of the court during the trial to the effect that testimony as to the existence of other holes in the sidewalk in that vicinity was admissible as evidence against the defendant. We will first discuss the last assignment of error, inasmuch as it challenges the competence of much evidence that went to the jury. It is urged by appellant that any evidence concerning the condition of the sidewalk at any point other than the one where the injury was received is totally inadmissible. Upon the other hand, the respondents urge that it is proper to admit testimony of other defects of long standing and in close proximity to show notice to the city of the general defective condition of the street, and as having some tendency to show notice of the particular defect involved. Under this theory the court permitted the condition of this sidewalk to be shown upon either side of the hole in question, and in front of the same block. A review of the following cases and others shows that the respondents' theory was, by the several courts, sustained: *Osborne v. Detroit*, 32 Fed. 36; *Fuller v. Mayor, etc., of Jackson*, 92 Mich. 197 (52 N. W. 1075); *Shaw v. President, etc., of the Village of Sun Prairie*, 74 Wis. 105 (42 N. W. 271); *Munger v. Waterloo*, 83 Iowa, 559 (49 N. W. 1028); *Gude v. Mankato*, 30 Minn. 256 (15 N. W. 175).

In *Osborne v. Detroit*, *supra* (decided by the United

States circuit court, E. D. Michigan), at page 39 of the opinion, the court says:

“The court was and still is of the opinion that plaintiff was not confined to proving the condition of the walk at the exact spot where the injury occurred. . . . Of course, there should be reasonable discretion exercised in admitting evidence of the condition of the walk near the accident, but we think, in any case, if it be so near the place of accident that a person examining the walk, or responsible for the condition of the walk in that neighborhood, would be likely also to notice the defect at the spot where the accident occurred, it would be competent.”

In *Shaw v. President, etc., supra*, at page 107 of the opinion (p. 272 of 42. N. W.) the court says:

“Several objections to the admission of testimony were made on behalf of the defendant during the trial, based upon the proposition that it was incompetent for the plaintiff to show any defects in the sidewalk, except at the precise place where the plaintiff was injured. Two rulings upon the subject to which exceptions were duly taken present this proposition for determination. One of these rulings permitted the plaintiff to show the condition of the sidewalk 50 or 60 feet each way from the place of the accident. The other ruling was the admission of evidence of the generally bad condition of the same sidewalk from that place south, nearly to the depot. Such testimony was admitted for the purpose of showing constructive notice to the village of the defect in the sidewalk at the place of the injury, there being no proof of actual notice in the case. The proposition upon which the above exceptions are based, to-wit, that the plaintiff should have been confined in her proofs of the condition of the sidewalk, to the place where she was injured, has been negatived by this court in several cases, and is against the great weight of authority elsewhere. The true rule doubtless is that for the purpose of showing constructive notice to the town or municipality of a defect in one of its highways, other defects therein in the vicinity, or the general bad condition

May, 1901.]

Opinion Per Curiam.

of the same street, sidewalk, or bridge, may be shown. The cases holding this rule are very numerous."

We think, therefore, that this testimony was admissible as tending to show notice to the city, on the theory that, if the city officials had exercised proper care in the inspection of the street, they would have discovered the particular defect. The court limited the testimony to the same block, and we think this was not unreasonable. It is contended by appellant's counsel, however, that the rule should not apply here, because, as they allege, the hole in question had been in existence but three or four days prior to the accident, and that the exercise of reasonable and ordinary care in examination for general defects would not have led to the discovery of this particular defect within so short a time. There is much conflict in the testimony as to the length of time a hole had existed there. A number of witnesses for the respondents testified that there had been a hole at that particular point for weeks, and some even said for months, prior to the time of the accident. It is, however, we believe, clear from the testimony that, whatever may have been the size of the hole that existed there before, the plank at that point was broken by the wheel of a loaded wagon, which passed over it a few days before the accident. This time is variously estimated by the witnesses, ranging from three or four days to a week. The evidence shows that an approach or a driveway had been constructed by some one for the purpose of driving across the sidewalk at this point in order to reach the private inclosure of the adjoining premises, and that a few days before this accident a wagon loaded with wood was driven across it, when one of the wheels broke a plank and left the hole in the condition it was at the time of the accident. Thus, while the hole was undoubtedly made larger by the action of the wagon wheel

within a short time before the accident, yet there is too much conflict in the testimony for this court to assume to say that there was no hole at all there prior to that time which might have called for the attention of the city authorities in the exercise of reasonable care, and which would, therefore, have charged the city with constructive notice under the authorities. It is, in any event, admitted that there was a hole there for three or four days before the accident; that is to say, from the time it was broken by the wagon wheel; and appellant contends that it cannot be charged with constructive notice in so short a time. No rule can be laid down as to the length of time that must elapse after a defect has existed before a city can be chargeable with constructive notice. The supreme court of Missouri, in *Carrington v. St. Louis*, 89 Mo. 208, 213 (1 S. W. 241, 58 Am. Rep. 108), says:

“Much depends upon the surroundings in cases of this character, for what might be negligence in not knowing of a dangerous condition of a sidewalk at one locality in the city, would [not] be at another. This walk was much used and resorted to and that called for increased care on the part of the city.”

The time which elapsed in the above case was about four hours, and the court held that the evidence was sufficient to justify the court in submitting the question of the city's knowledge of the obstruction to the jury. The above may be said to be an extreme case, as the facts surrounding the case occurred upon one of the much traveled streets of the city of St. Louis. It serves, however, to illustrate the principle that no arbitrary rule can be adopted by courts as applying to this question of lapse of time in order to charge a municipality with constructive knowledge. The evidence in this case shows that Tallman avenue, in the city of Ballard, is a much traveled street for a city of that size. One of the public school buildings is located

May, 1901.]

Opinion Per Curiam.

only a short distance from the scene of this accident, and several hundred school children are in daily attendance at said building, many of whom travel upon said street. Several churches are also near, and persons attending services thereat travel along this street, besides the usual and ordinary travel of residents in that locality. We believe, under any view of this question of the lapse of time, that the circumstances of this case were such as justified the court in submitting the matter of negligence to the jury. This is further emphasized by the fact that the evidence shows that the planks of the sidewalk at that point were elevated above the ground at least from ten to twelve inches, were supported by stringers, and that the aforesaid approach for a wagon driveway lengthwise of said planks had existed for a long time prior to the accident. We think it was proper for the jury to consider whether the existence of that driveway, under the circumstances, called for greater vigilance on the part of the city in watching for defects at that particular place than it would have been chargeable with had no such driveway existed.

Referring again to the matter of the admitted testimony as to other defects than the particular one, we think it is manifest that the jury could not have considered such testimony for any other purpose than that for which the court admitted it. The court gave the following instruction to the jury:

“Before you can find for the plaintiff, you must find that the walk in question, at the time and at the particular place of the alleged injury, was so defective and dangerous as not to be reasonably safe for public travel, and that said defect or dangerous condition of the walk at that place had existed for such a length of time and was so manifest to the senses that the officers and agents of the city could, with reasonable diligence, know, or by the exercise of reasonable care would have known, it in time

to have remedied the defect before the accident. There is evidence before you as to the location of the hole in which the plaintiff, Mrs. Laurie, is alleged to have received injuries. I charge you that in arriving at your verdict you have no right to find for the plaintiff on account of any negligence of the defendant, if there was any such negligence, in regard to other holes or defects. Unless you find that the defendant was negligent in respect to the particular hole or defect where the plaintiff, Mrs. Laurie, is alleged to have received her injuries, your verdict must be for the defendant."

In view of the foregoing instruction, we think no confusion could have existed in the minds of the jury upon this subject.

The evidence clearly shows that Mrs. Laurie received injuries from stepping through the hole in the sidewalk, and, for the reasons heretofore stated, we think the court properly submitted the question of negligence on the part of the city, and also that of contributory negligence on the part of Mrs. Laurie, to the jury, and that it committed no error in denying appellant's challenge to the evidence, and its motion to withdraw the case from the jury.

The judgment is therefore affirmed.

[No. 3694. Decided May 3, 1901.]

THE STATE OF WASHINGTON, *Appellant*, v. ROBERT FROST,
as *Treasurer of Thurston County, Respondent*.

TAXATION — SCHOOL LANDS — CANCELLATION OF SALE — RIGHTS OF
STATE NOT DIVESTED BY TAX SALE.

Under Laws 1893, p. 335, § 26, which provides that "property held under a contract for the purchase thereof, belonging to the state, county or municipality, and school and other state lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same," only the interest of the contractor for the purchase of state school lands, where the con-

25	134
31	455
25	134
435	829

May, 1901.] Opinion of the Court—REAVIS, C. J.

tract of sale has been subsequently canceled for non-payment of installments of purchase price due, can be charged with taxes; and the state's right to the purchase price, or its right to forfeit the contract for non-payment thereof, cannot be divested by a tax sale of such lands (*Washington Iron Works Co. v. King County*, 20 Wash. 150, distinguished).

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Reversed.

Thomas M. Vance, Assistant Attorney General, for the state.

George H. Funk, Prosecuting Attorney, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Suit to enjoin the treasurer of Thurston county from selling the northeast quarter of the southeast quarter of section 16, township 17 N., range 1, for state, county, and municipal taxes. The tract is school land, owned by the state under the grant of school lands by the United States. In April, 1891, it was sold to one Frederickson for the sum of \$400, payable in ten annual installments of \$40 each, with interest thereon. One payment was made, and interest on the deferred payments up to July, 1892, and no further payments thereafter were made; and, under the provisions of the contract between Frederickson and the state, on the 27th of November, 1897, it was duly canceled by the commissioner of public lands for the non-payment of installments due on the purchase price. Taxes from the year 1891 to 1897, inclusive, were levied against the land by the proper officers of Thurston county, amounting in the aggregate to the sum of \$18.12. The respondent treasurer was proceeding to sell certificates of delinquency in the amount of the taxes levied against the land, when the appellant, on the relation of the attorney general, filed its complaint in the superior court, praying that the respondent be enjoined from fur-

ther attempting to collect the taxes. Respondent demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, appellant standing upon the demurrer, judgment was entered thereon dismissing the suit.

The errors assigned here are sustaining the demurrer and entering judgment of dismissal. It is maintained by counsel for the state that the sale of land for taxes levied against it under the current revenue law conveys to a *bona fide* purchaser at a tax sale a new and independent title, clear of all incumbrances and equities, and that his title relates not to a pre-existing chain, but is complete in itself,—that is, where the tax is regularly and properly charged against the land; that the contemplated sale will thus divest the right of the state to collect the purchase price of the land disposed of under the contract with Frederickson, and that the school land involved in the contract will thus be disposed of in violation of the federal trust granting the lands to the state; and also that the tax levied against the land is a tax upon the property of the state and thus inhibited by the constitution. Counsel for respondent seems to concede the effect of the tax sale, and insists that the state must be dealt with in the same manner as any other vendor of real estate who has reserved the lien for unpaid installments of the purchase price, and if the vendee fails to pay the tax the vendor may protect itself by a payment of the same. Counsel seem to regard the case of *Washington Iron Works Co. v. King County*, 20 Wash. 150 (54 Pac. 1004), as decisive of the controversy. Some of the expressions used in the opinion in that case may be misleading when considered beyond the facts before the court. It was observed there:

“Some question is made by counsel for appellants upon the meaning of the revenue law when it declares that ‘prop-

May, 1901.] Opinion of the Court—REAVIS, C. J.

erty held under a contract for the purchase thereof, belonging to the state, county or municipality, and school and other lands, shall be considered for all purposes of taxation the property of the person so holding the same;’ counsel contending that not the land itself, but only the improvements and the interest of the purchaser in the land, can be taxed; that whatever interest the purchaser may have in these lands should be listed as personal property, under the revenue act. But such construction of the revenue act cannot be maintained, especially in view of the covenant inserted in the contract of purchase by authority of the statutes. It is upon *land* that the tax is laid.”

The opinion then proceeds to show the substantial interest which the contractor in possession, use, occupation, and enjoyment of the land actually possessed; that he enjoyed during the term of the contract all the fruits of complete ownership. The case was a suit by one holding tide land under contract, with all the incidents of ownership, to enjoin the collection of a tax upon tide land appraised at its full value as land, and who, in his contract of purchase with the state, had covenanted that he would pay all taxes and assessments of every kind levied upon the land. The argument there for the contractor was that only his interest in the land should be taxed, and as personal property. It was in answer to that argument that the expressions referred to were used in the opinion; that is, his covenant required the payment of the full appraisement made as land. What seems to have been in view was the rule for the extent of the assessment, and the case of *Wells v. Mayor & Aldermen of Savannah*, 87 Ga. 397 (13 S. E. 442), was mentioned with approval, and quoted from as follows:

“Relatively to the question of taxation, it makes no substantial difference whether the estate or property of beneficial owners be classed as realty or personalty; whatever

property of either kind belongs to them is taxable *ad valorem*."

It was also mentioned that the appellant could not assert, in the face of his covenant to pay the assessment and taxes, that there was another remedy by the state,—the forfeiture of the contract; or assert any rights of the state; and no equity was shown in his complaint. It was not adjudged that the purchaser at a tax sale acquired a free and independent title to the land, and we do not now think such a purchaser does. The state may dispose of its granted lands upon such terms and in such form as it may choose, having due regard to the conditions of the trust imposed upon the grant, which relates to the limitation in price; and the legislature has enacted that each contract for the sale of such lands shall provide for the payment of all taxes and assessments against the lands. A further provision is made that such contracts may be forfeited by the executive department, if such payment is not made. Primarily these contracts imply that assessments and taxes shall be levied upon these lands. Thus the statute authorizing their sale provides for such taxation. It must not be inferred from such provision and the language of the statutes that the legislature intended to tax the lands while the ownership is in the state, as such, because that is forbidden by the constitution.

Again, the legislature, in the revenue law (Laws 1893, p. 335, § 26), declares:

"Property held under a contract for the purchase thereof, belonging to the state, county or municipality, and school and other state lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same."

It would seem fair to construe this legislation as charging the interest of the contractor for public lands with the payment of all taxes and assessments levied against the

May, 1901.] Opinion of the Court—REAVIS, C. J.

land, and that such interest only is chargeable. The procedure prescribed is as against the land, but, as we have seen, it is against the land for the purpose of fixing the amount of the assessment. The land is assessed at its fair cash value as land, but the interest in the land intended to be charged is that of the contractor. Such a construction is in harmony with the constitutional provision and all the obligations of the federal trust, and may fairly be given to the statute and the purpose intended by the legislature accomplished. It is apparent that the legislature intended that the large areas of tide, school, and other granted lands, which are sold under long time contracts, and with the presumption in each instance that the contract will be carried out in good faith, should not be reserved from the taxing power of the state; that such property, valuable and enjoyed by the contractor as owner during the existence of the contract, should bear the just burdens of government.

We therefore conclude that the title passed to the purchaser at the tax sale is that of the interest of the contractor; that the state is not divested of its right to the purchase price, or its right to forfeit the contract upon non-payment of the purchase price. But in the case before us it appears that the contract was duly canceled in the year 1897, and that the contractor has, in fact, no interest in the land. It would therefore be an idle act for the respondent to proceed with the sale and place an apparent cloud upon the title. We think, upon this consideration, the demurrer should have been overruled.

The judgment is reversed for further proceedings in accordance with this opinion.

FULLERTON, ANDERS, DUNBAR and WHITE, JJ., concur.

[No. 3345. Decided May 4, 1901.]

SKAGIT COUNTY, *Respondent*, v. H. H. TROWBRIDGE, *Appellant*.

ARBITRATION — FINALITY OF AWARD — REVIEW BY COURTS.

Where parties to a dispute agree to submit their differences to arbitration, under the provisions of the statutes applicable thereto, and, by the terms of their submission of the controversy to arbitration, agree to be bound by its results, the award made by the arbitrator is final, and not reviewable by the courts, in the absence of any showing of misconduct or corruption on his part.

Appeal from Superior Court, Skagit County.—Hon. JESSE P. HOUSER, Judge. Affirmed.

E. F. Blaine and *Lee De Vries*, for appellant.

M. P. Hurd, Prosecuting Attorney, for respondent.

PER CURIAM.—In the year 1892 the Burrows Bay Improvement Company, a corporation, constructed a steam railway from the main line of the Seattle & Northern Railway Company, in the town of Anacortes, Skagit county, to Shannon's Point, in said county. In the exercise of the taxing power, the authorities of Skagit county undertook to assess and levy taxes upon said property for the years 1893, 1894, 1895 and 1896. On the 23d day of September, 1896, the appellant, in an action in the superior court of King county, recovered judgment against said company for the sum of \$6,270 and costs; and thereafter he caused an execution to issue, and a levy was made thereunder upon the unballasted railway track of said company. A sale was made under the execution by the sheriff of Skagit county, and appellant was the purchaser of the property. By reason of Skagit county's claim for taxes

May, 1901.]

Opinion Per Curiam.

under the aforesaid assessments and levies, the taxes not having been paid, the said county threatened to enjoin the removal of the rails purchased by appellant as aforesaid; and it was thereupon agreed between appellant and said county that, in lieu of said rails, appellant should deposit with the First National Bank of Mount Vernon the sum of \$700, which money should remain with said bank to answer any judgment that might thereafter be recovered in favor of said county for taxes. At the same time it was agreed that the parties should thereafter agree upon some procedure for the determination of the validity of the taxes claimed against said rails, and the right of appellant to remove the rails before the taxes were paid. It was further agreed that either party should have the right to commence a proper proceeding for the determination of said controversy, or, not desiring to do so, the matter should be submitted to arbitration according to the laws of the state of Washington, before one arbitrator, who should be an attorney at law in active practice and good standing and a resident of the town of Mount Vernon, to be chosen by the county commissioners of Skagit county. The \$700 was accordingly deposited by appellant with said bank, and the rails were removed from Skagit county. Thereafter the parties decided to determine the controversy by arbitration, and in pursuance of the terms of the aforesaid agreement the county commissioners of Skagit county chose Thomas Smith as arbitrator. Thereupon a written agreement to submit the said controversy to arbitration before said Thomas Smith as arbitrator was duly signed by each of the parties. The matter came on for hearing before said arbitrator, who, after hearing the testimony, made his award in favor of the county. In pursuance of the terms of the statute, the award was properly delivered and was thereafter duly filed with the clerk

of the superior court of Skagit county. The award, in terms, provided that the money deposited in the bank aforesaid was awarded to be the property of Skagit county, to be turned over to the treasurer of said county in payment of the taxes due and delinquent upon said railroad property. The arbitrator delivered with the award a transcript of the testimony taken before him, together with his findings of facts and conclusions of law, and the same were duly filed by the clerk together with the award. Appellant filed a number of exceptions to said findings of facts and conclusions of law and to the award. The superior court, after hearing and considering the exceptions affirmed the award and entered judgment accordingly. Whereupon appellant appealed to this court.

The written agreement to submit this controversy to arbitration contains the following provision:

“And the plaintiff and defendant do mutually covenant and agree to and with each other that the award to be made by said arbitrator shall in all things by us, and each of us, be well and faithfully kept and observed.”

It seems to us clear that the parties intended by the above clause of the agreement to bind themselves to abide by the award of the arbitrator. This agreement must be treated as any other contract, in determining the rights of the respective parties thereunder. This court, in *Van Horne v. Watrous*, 10 Wash. 525, 527 (39 Pac. 136), has said:

“Courts will enforce contracts to arbitrate disputes and make the decision of arbitrators final where the parties to a contract make it clearly to appear that such was their intention.”

Presumably, the purpose of disputants in adopting this method of settling differences is to avoid the ordinary expense, delay, and more intricate practice attending suits

May, 1901.]

Syllabus.

in the courts. Having adopted this method and having agreed to abide by its results, they cannot be heard to complain, in the absence of any showing that the arbitrator was guilty of misconduct or corruption. No such showing is made in this case.

The judgment is affirmed.

[No. 3389. Decided May 4, 1901.]

CHARLES S. WALLACE, *Respondent*, v. OCEANIC PACKING
COMPANY *et al.*, *Appellants*.

APPEAL — BOND — OBJECTIONS TO SURETIES — NEW BOND — TIME OF
FILING.

Where objection is made to the sufficiency of the sureties upon an appeal bond, and a day is set for their examination, but they fail to appear and justify on said day, the appellant is warranted, under Bal. Code, § 6510, in filing within five days thereafter a new bond with new sureties.

SAME — EXTENSION OF TIME FOR FILING OF STATEMENT — BY WHOM
GRANTABLE.

Under Bal. Code, § 5062, which provides that the time for filing a statement of facts may be extended "by an order of the court or judge wherein or before whom the cause is pending or was tried," where there are several judges presiding over the superior court of a county, any one of such judges may enter an order extending the time for filing a statement of facts, although the cause was tried before another judge of that court.

PRINCIPAL AND AGENT — RESCISSION OF CONTRACT — AUTHORITY — IN-
TEREST OF AGENT.

Where a corporation has not authorized the rescission of a contract entered into by its president in its behalf, such president has no authority to rescind, even though the contract may have been made by him under a general authority to enter into such contracts without submitting the same to the board of directors; and especially is this so where his own private interest would be advanced by the rescission at the expense of his principal.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Metcalf & Jurey and Lewis, Hardin & Albertson, for appellants.

Burleigh & Piles and L. Frank Brown, for respondent.

PER CURIAM.—The substance of the controversy in this cause is as follows: In the month of March, 1898, respondent Wallace and appellant Robertson, together with one Schumacher and one Ray, entered into negotiations having in view the chartering of a sailing vessel for the Alaskan trade. As a result of these negotiations, each of said persons contributed in cash the sum of \$550, making \$2,200 in all, to be used as a fund for said purpose. Thereafter, to wit, on the 26th day of March, 1898, a charter party was executed between the appellant, Oceanic Packing Company, a corporation, of the first part, and respondent Wallace, for himself and as trustee for the three other individuals above named, of the second part, whereby the said Oceanic Packing Company, as the owner of the American brigantine Blakeley, let and chartered said vessel for a period of two months to said second parties at a rental of \$1,100 per month, or \$2,200 for the whole of said period. The whole sum of \$2,200 was paid to said company at the time of the signing and delivery of the charter party. The vessel was then at sea on a voyage to Alaskan ports, and it was stated in the charter party that she was due to arrive at Seattle on or about April 5, 1898; and it was agreed that immediately upon her arrival, or as soon thereafter as necessary repairs or alterations could be made, she should be delivered to second parties under their said charter. It was further agreed that in the event said vessel did not reach Seattle on or before April 5, 1898, then second parties should take her

May, 1901.]

Opinion Per Curiam.

as soon after said date as she should arrive. The vessel did not reach Seattle until the 29th day of April, 1898, and immediately thereafter she was placed upon the ways for the purpose of receiving what her owner deemed to be proper and necessary repairs. Soon after the completion of the repairs, to wit, on the 9th day of June, 1898, the said Oceanic Packing Company notified each of said charterers that the vessel was ready for sea, and that the period covered by said charter was begun on that day. The said Robertson, one of the charterers, was also the president of the Oceanic Packing Company, and as such president he executed the said charter party in behalf of said company, while the respondent, as trustee aforesaid, executed it upon the other part as trustee for said Robertson individually and also for all the charterers. It is claimed by respondent that some time after the execution of the charter party, the said Robertson, acting for and in behalf of said Oceanic Packing Company, released the charterers from their obligations under their said contract, and that it was mutually agreed between the parties that the same should be abandoned and rescinded. The alleged rescission of the charter party is denied by appellants. On the 23d day of June, 1898, said Schumacher assigned to respondent his interest in the \$550 paid by him as aforesaid, and soon thereafter respondent instituted this action to recover the \$550 originally paid by himself and also the \$550 paid by Schumacher, the claim for which had been assigned to respondent as aforesaid. The action was brought against the Oceanic Packing Company and said Robertson jointly, and judgment was demanded against both defendants in the sum of \$1,100. A trial was had before a jury, and a verdict returned in favor of respondent and against appellants in the sum of \$1,100. Appel-

lants moved for a new trial. Their motion was denied, and they thereupon appealed to this court.

Respondent moves to dismiss the appeal upon several grounds: First. "Because the notice of appeal was not filed within the time limited by law." The judgment was signed by the court on the 24th day of April, 1899, and was filed April 25, 1899. The record shows that the notice of appeal was both served and filed on the same day the judgment was signed by the court. This was certainly within the time limited by law. Second. "The appeal bond was not filed within the time limited by law." An appeal bond was filed the same day the judgment was signed by the court, to-wit, April 24th. On the following day respondent served notice that he excepted to the sufficiency of the sureties, and demanded that the sureties appear before the court on the 1st day of May for the purpose of justifying. The sureties did not appear to justify, but within five days after the 1st day of May, to-wit, on the 5th day of May, appellants filed a new bond. This perfected the appeal, under the terms of § 6510, Bal. Code. See, also, *Spurlock, v. Port Townsend Southern R. R. Co.*, 12 Wash. 34 (40 Pac. 420). No exception was taken to the last bond filed. Third. "That said appeal bond is not in form or substance such as to render the appeal effectual, for that the appeal has not been diligently prosecuted." We see no merit in this suggestion. The bond seems to conform to the statute in form, and in amount it is sufficient, as far as appears upon the face of the judgment. Fourth. "Because the time for filing the statement of facts was extended by a judge who did not preside at the trial of the cause and the same was extended without any authority under the law." We think the order extending the time was authorized by the terms of §§ 4669, 5062, Bal. Code. Section 5062 provides that

May, 1901.]

Opinion Per Curiam.

such extension may be made "by an order of the court or judge wherein or before whom the cause is pending or was tried." It seems to us clear that the statute contemplates that either the court wherein the cause is pending or the judge before whom the cause was tried may extend the time. *State ex rel. Bickford v. Benson*, 21 Wash. 365 (58 Pac. 217). One of the judges presiding over the superior court of King county entered the order extending the time, but he was not the judge who tried the cause. The statement of facts itself is, however, duly certified by the judge who tried the cause. The motion to dismiss the appeal is in all particulars denied.

The vital question involved upon the merits of this case is, Was there an abandonment or rescission of the charter party contract? That was the only fact submitted to the jury by the court's instructions. At the close of respondent's testimony the appellants moved the court for a nonsuit upon the grounds "(1) that no mutual abandonment of this contract has been proven; and (2) that they have not shown that the Oceanic Packing Company was a party to the transaction." The motion was denied by the court and appellants' exception duly noted. Upon the subject of a contemplated abandonment it is not claimed that any conversations were had with any one in any way identified with the Oceanic Packing Company, except with the appellant Robertson, who was the president of the company. Robertson, as has already been stated, was also one of the four charterers who entered into the charter-party contract with said company. The negotiations leading up to that contract were first had with Robertson as the president of the company, and it is contended by respondent that, if Robertson had authority to enter into the contract in behalf of the company, he also possessed sufficient authority to agree to an abandonment of it. The

written contract shows that the corporation itself "has caused these presents to be executed by its president and general manager, and has affixed its corporate seal hereto." In the absence of other showing it must therefore be presumed that the contract had been theretofore authorized by the board of trustees of the corporation, and that Robertson was only following the instructions of the company when he executed the written contract. But even if it were true that Robertson was clothed with general authority to enter into such contracts without submitting the same to the board of directors, it does not follow that he would have authority to abandon a contract once made, which abandonment would involve the repayment of \$2,200 already received by the company. The contract as made must be presumed to have been advantageous to the company, and one the fruits of which the company gladly received. Robertson would have been a beneficiary under an abandonment of the contract, inasmuch as he would have received back the \$550 paid by himself. To say, therefore, that, because he may have first agreed upon a contract the terms of which were advantageous to his company, he has also authority to rescind the same, to the disadvantage of his company and to his own personal advantage, we think is not founded in good reasoning and is not supported by just principles. There is conflict in the testimony as to just what did occur, looking to an abandonment. Robertson claims that all he said was that, if the company could sell the vessel at a price satisfactory to it, the charterers could then be released from the contract. But, assuming that respondent's version of what occurred is true, we fail to find any evidence in the record showing that Robertson had any authority from his company to enter into an agreement to abandon the contract and for the return of the money

May, 1901.]

Syllabus.

by the company. Particularly because of the fact that Robertson himself would have become a beneficiary thereunder to the extent of \$550, such an agreement cannot be upheld, unless it is shown that it was expressly authorized by the board of trustees, with full knowledge of all the facts. Fidelity in the agent is what is expected, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. *Flint & Pere Marquette Ry. Co. v. Dewey*, 14 Mich. 477; *Wardell v. Railroad Co.*, 103 U. S. 651; *Victor Gold & Silver Mining Co. v. National Bank*, 15 Utah, 391 (49 Pac. 826); *Gallery v. National Exchange Bank*, 41 Mich. 169 (2 N. W. 193, 32 Am. Rep. 149); *Wilbur v. Lynde*, 49 Cal. 290 (19 Am. Rep. 645).

Since it does not appear that Robertson was authorized by the corporation to enter into any agreement for abandonment and rescission, we think the court erred in denying the motion for non-suit. The motion for a new trial also raised the same question, under the head of "insufficiency of the evidence to justify the verdict."

The judgment is reversed and the cause remanded, with instructions to the lower court to enter judgment of non-suit on appellants' motion.

[No. 3290. Decided May 7, 1901.]

THE TIMES PRINTING COMPANY, *Respondent*, v. CITY OF SEATTLE *et al.*, *Appellants*.

APPEAL — STATEMENT OF FACTS — SERVICE ON ATTORNEY.

Under Bal. Code, § 4889, which provides the manner of making service of notices necessary in the conduct of actions, and declares that the services may be personal or by delivery to the party or attorney on whom service is required to be made, or it

may be as follows: "If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office," service of a proposed statement of facts on appeal, made upon a clerk, is insufficient, when the attorney himself is present in the office.

CITY PRINTING — WRONGFUL AWARD — INJUNCTION — SUFFICIENCY OF COMPLAINT.

In an action of injunction to compel a city to award its public printing to plaintiff and to prohibit its publication in a newspaper to which the city had awarded the contract, the complaint states a cause of action when it alleges that the city called for bids for city printing under the terms of its charter which required the city council to designate as city official newspaper that newspaper whose owner offered the lowest proposals; that plaintiff filed a bid to do the city printing for 21 cents per inch for the first insertion, and 20 cents per inch for each subsequent insertion; that the bid accepted by the city from plaintiff's competitor was for 35 cents per inch for the first insertion, and 30 cents per inch for subsequent insertions, measurement to be by nonpareil type, matter set solid; that plaintiff's bid was rejected on the ground that it was indefinite, but plaintiff alleges it was made in view of a general existing custom that city printing was measured in nonpareil type, matter set solid, and that this fact was well known to the city council before it made its award; that the award to plaintiff's competitor will cost the city about \$2,800 more than if the award should be made to plaintiff; that plaintiff is a taxpayer, and that the city council wantonly, with intent to defraud the plaintiff and all other taxpayers of said city, attempted to award said printing to plaintiff's competitor.

Appeal from Superior Court, King County.—HON. ORANGE JACOBS, Judge. Affirmed.

Stratton & Powell and *W. E. Humphrey*, for appellants.

Bausman, Kelleher & Emory, for respondent.

PER CURIAM.—The respondent, the Times Printing Company, brought this action against the Post-Intelli-

May, 1901.]

Opinion Per Curiam.

gencer Publishing Company, the city of Seattle, and the city councilmen thereof, and prayed for an injunction prohibiting the publication of the city printing in the Post-Intelligencer, a newspaper published by the Post-Intelligencer Publishing Company, and for a mandatory injunction compelling the city authorities to award the city printing to the respondent and to recognize respondent's paper as the city official newspaper for the year 1899. In the month of November, 1898, bids for the city printing of the city of Seattle for the year 1899 were regularly submitted in pursuance of a published notice calling for such bids. The bid of the Times Printing Company states the following terms, to-wit: "For each first insertion, twenty-one cents per inch. For each subsequent insertion, twenty cents per inch." The bid of the Post-Intelligencer Publishing Company states the following terms, to-wit: "For the first insertion, per inch, 35 cents. For each subsequent insertion, per inch, 30 cents. Measurement to be by nonpareil type, and matter set solid." The complaint shows that the charter of the city of Seattle provides that, when bids for the city printing have been submitted and opened, "thereupon the council shall, by resolution, announce the names of all parties whose proposals have been offered, and the terms of their proposals, respectively, and designate as city official newspaper that newspaper whose manager or owner has offered the lowest proposals," etc. Upon opening the aforesaid bids, the city council, by resolution, declared the bid of the Post-Intelligencer Publishing Company to be the lowest one, and designated the Post-Intelligencer as the city official newspaper for the year 1899. This action of the council was based upon the fact that the bid of the Times Printing Company did not designate the method of measurement or the kind of type with which it proposed to do the

printing, whereas that of the Post-Intelligencer Publishing Company specified, "Measurement to be by nonpareil type, and matter set solid." From this the council determined that the bid of the Times Printing Company was indefinite and that the other was the lower bid. The complaint contains the following, among other averments:

"That under the general custom and usage well known throughout the United States, and the state of Washington, and the city of Seattle in particular, there is now, and was at all the times herein mentioned, a general customary standard of measurement in general use for all legal and official advertisements in daily newspapers throughout the United States, the state of Washington, and particularly the said city of Seattle; that said general, customary standard of measurement is in nonpareil type, in matter set solid in columns two and one-sixth inches wide in length of line of matter and two and one-quarter inches between column rules, there being in each inch of said legal and official advertisements twelve lines. That at all the times herein mentioned, and at the time of the submission of said bids to the said city council, said general custom and usage was well known to all the defendants herein. That the plaintiff herein, in filing with the said city clerk aforesaid its said proposals, had in mind said general custom and usage, and that said proposal was made with the understanding on the part of plaintiff that said general customary standard of measurement, to-wit, nonpareil type, in matter set solid, should be considered as a part of its bid. That when said bids were opened by said city council they were held under consideration one week without further acting thereon, and while said bids were so held under consideration, said plaintiff made known to said city of Seattle, and to said city council, and to each and all the members thereof, that said general customary standard of measurement existed, and that plaintiff desired that its said proposal should be considered in the light of said general customary standard of measurement; and made known to said city council, and to each and all the members thereof, that it desired to be understood by its said

May, 1901.]

Opinion Per Curiam.

proposal that it intended to use said general customary standard of measurement, towit, nonpareil type, and matter set solid; and made known to said city council then and there that it desired a resolution to be adopted by the said city council designating the newspaper of plaintiff as the city official newspaper for the fiscal year 1899, and to have incorporated in the said resolution the said general customary standard of measurement, towit, nonpareil type, in matter set solid."

It is further averred that the respondent is a taxpayer of the city of Seattle, and pays each year several hundred dollars in general taxes for municipal purposes in the city of Seattle and county of King; that, if its bid should be accepted, the cost to the city for its official printing would be about \$5,000; whereas if the bid of the Post-Intelligencer Publishing Company should be accepted it would cost the city at least \$7,800. That these facts were well known to each member of the city council, but, notwithstanding the same, the council wantonly, maliciously, fraudulently, and with the intent to defraud the plaintiff and all other taxpayers of said city out of at least the sum of \$2,800, attempted to award said printing to the Post-Intelligencer Publishing Company by adopting a resolution of the purport above mentioned. A trial was had, which resulted in a decree granting to plaintiff below a permanent injunction as prayed in the complaint, the purport of which was first hereinbefore mentioned. The defendants below have appealed from said judgment.

Respondent moves to strike the statement of facts upon the following grounds:

"(a) No copy of the statement of facts appears to have been served upon this respondent after the original was filed in the cause. (b) There does not appear to have been any service at all of any copy of the statement of facts upon this respondent. (c) That there has been no written notice, nor any notice at all, served upon this respondent."

ent of the filing of the statement of facts in the lower court. (d) Because the statement of facts was certified by the judge without notice to this respondent and without any proof being filed of the service of the statement of facts upon this respondent. (e) That said statement was signed by the judge without any proof being filed that no amendments had been proposed by this respondent."

Some of the grounds urged upon the motion would be applicable under a former statute, as would also the decisions of this court cited in support thereof; but since the passage of the statute of 1893, as found embodied in Bal. Code, § 5058, they do not apply. However, the grounds noted under "a" and "b," as above set forth, present a question that must be passed upon. The original record, as brought to this court, contained no proof whatever that the statement of facts had ever been served upon respondent. The affidavit of one Ralph D. Nichols is, however, brought here in a supplemental record, and states the following facts:

"That affiant is an assistant in the law office of Stratton & Powell, attorneys for the defendant Post-Intelligencer Publishing Company above named; that on the 5th day of May, 1899, affiant, for Stratton & Powell, as attorneys for the said defendant Post-Intelligencer Publishing Company, filed with the clerk of the above entitled court, the proposed statement of facts in the above entitled cause, and that subsequent to the filing of the same, and upon the same day, affiant served the same upon Bausman, Kelleher & Emory, attorneys for the above named plaintiff, by leaving a true copy at their office on the sixth floor of the Bailey Building in the city of Seattle, with A. F. Bunch, a clerk of said firm, then employed in said office, and in the presence of Frederick Bausman, a member of said firm."

This proof, which is now submitted by supplemental record, shows that any service which may have been made was made by leaving a copy of the proposed statement

May, 1901.]

Opinion Per Curiam.

with a clerk of the firm of attorneys who represented respondent, but *in the presence of a member of the firm*. Section 4889, Bal. Code, provides the following method for such service:

"The ~~services~~ may be personal or by delivery to the party or attorney on ~~whom~~ service is required to be made, or it may be as follows: If upon ~~an~~ attorney, it may be made during his absence from his office by ~~leaving~~ the papers with his clerk therein, or with a person having charge thereof."

It will thus be seen that when an attorney is in his office the notice or paper *must be left with him*; and it is only in the event of his absence from his office that it may be left with a clerk. The affidavit states that a member of the firm of attorneys was present, which being true, the only effective service that could be made under the statute above quoted was by leaving the copy with him. It is not stated in the affidavit that the member of the firm who was present even had knowledge that the copy was left with the clerk. But, in any event, the attorney is entitled to have it served upon himself when he is present in his office. We must apply the statute as we find it. It is plain and unambiguous, and we do not feel authorized to give it any other interpretation than that which must be gathered from a strict reading thereof. The motion to strike the statement of facts must, therefore, be granted.

The remaining question is, Does the complaint state a cause of action? A demurrer was interposed to the original complaint, which was by the court overruled. A supplemental complaint was also filed, which contains the substance of the recitals set forth in the original complaint, together with others. No demurrer appears to have been filed as against the supplemental complaint under which the cause appears to have been tried. There is, therefore, no assignment of error upon demurrer as to

the supplemental complaint. The second assignment of error, however, is that the court erred in admitting any evidence at the trial. This challenges the sufficiency of the supplemental complaint in this court. The more material averments of the supplemental complaint have been hereinbefore mentioned, and an examination of the whole complaint satisfies us that it states a cause of action. The findings of the court fully sustain the averments of the complaint.

The judgment must therefore be affirmed.

[No. 3634. Decided May 7, 1901.]

JOHN E. BINGHAM, *Respondent*, v. HOWARD R. KEYLOR,
Appellant.

PARTNERSHIP — FRAUD OF PARTNER — FALSIFYING ACCOUNTS — ACCOUNTING.

In an action for an accounting brought by one partner against a copartner who has falsified the accounts of the firm and misappropriated funds, the defrauded member of the firm is entitled to a judgment for one-half the sum, with interest thereon, that the court finds the firm has been damaged by reason of the misconduct of the defendant and the misappropriation by him of the funds of the firm, where defendant's services, as well as those of plaintiff, were of appreciable and substantial value to the firm over and above the damages the firm sustained by reason of his misconduct.

SAME — DESTRUCTION OF ACCOUNTS — EVIDENCE — AMOUNT MISAPPROPRIATED — BASIS OF ESTIMATING.

Where one partner falsifies the accounts and spoliates the records of the firm, evidence of the earning capacity of the firm is admissible for the purpose of supplying a basis upon which to estimate the damages of the partner who asks an accounting.

APPEAL — WHEN INTERLOCUTORY ORDERS REVIEWABLE.

Alleged error of the court in overruling a motion to dissolve an attachment is reviewable on appeal from the final judgment, although not designated in the notice of appeal pursuant to the

25	156
27	267
27	268

25	156
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25	156
40	183

May, 1901.] Opinion of the Court — WHITE, J.

provisions of Bal. Code, § 6503, which requires the appellant to designate from what order or judgment the appeal is taken, since the case is governed by § 6500, subd. 1, which provides that, when the appeal is from any final judgment entered in the action, an appeal from such judgment brings up for review any order made in the action, either before or after judgment, in case the record shall show such order sufficiently for the purposes of a review thereof.

ATTACHMENT — DISSOLUTION OF WRIT — RES JUDICATA AS TO OTHER GROUNDS.

Under Bal. Code, § 5359, which authorizes the issuance of successive writs of attachment, and § 5380, which provides for the amendment of the affidavit for the writ, in case of any defect which can be amended so as to show that a legal cause for the attachment existed at the time it was issued, the dissolution of an attachment on one ground is not *res judicata* when a new or amended affidavit sets up an entirely new ground for the writ.

SAME — CONCLUSIVENESS OF COURT'S FINDING ON FACTS.

Where the statute authorizes the trial court to determine the facts on a motion to discharge a writ of attachment, every presumption must be in favor of the conclusion reached by that court, unless the contrary clearly appears.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

W. T. Dovell and B. L. & J. L. Sharpstein, for appellant.

George T. Thompson, Wellington Clarke and E. W. Bingham, for respondent.

The opinion of the court was delivered by

WHITE, J.—The amended complaint in this action alleged that about the 1st of March, 1889, the plaintiff (respondent) and defendant (appellant) were both medical doctors and surgeons, and that they entered into a copartnership for the purpose of practicing their professions together at Walla Walla, Washington, as equal partners, under the firm name and style of Bingham & Keylor, which

partnership was to continue during their pleasure* (this partnership continued until October 18, 1897); that during said copartnership the defendant, without the assent of plaintiff, misapplied the receipts and profits of their business to his own use, and thereby defrauded the copartnership; that the plaintiff was unable to state the amount the defendant had defrauded the copartnership of, because the defendant had falsified the account books of the copartnership. The complaint alleged: That the defendant was intrusted with the keeping of the accounts of the partnership business, with collecting bills due the partnership, with the purchasing of supplies for the use of the partnership, and disbursing partnership funds in payment of bills against the partnership. That in performing this duty the defendant had frequently committed the following acts, and thereby defrauded the copartnership, to wit:

“(1) He has failed and neglected to enter in the partnership accounts charges for services rendered patients, and then has presented bills to the same patients for services rendered by the partnership, and has collected the same and applied the proceeds to his own use, without entering the collections in the partnership accounts, or charging himself with the money so earned and collected, or in any way accounting for the same.

“(2) He has likewise rendered bills to patients, and collected the same, and charged himself in the accounts with less than he collected, and applied the excess to his own use, and not accounted for the same.

“(3) He has purchased supplies and goods, and charged them to the partnership, and converted the goods to his own use.

“(4) He has purchased supplies for the partnership, and has credited himself in the accounts with paying for them more than the goods cost.

“(5) He has collected money owing to the partnership, and has failed to charge himself with the same, or to account for the same, but he has converted the same to his

May, 1901.] Opinion of the Court — WHITE, J.

own use, and has thereby defrauded the partnership in the sum of over four thousand dollars.”

There was a further allegation that the plaintiff had requested the defendant to pay into the copartnership and account for the money alleged to have been received and misappropriated by him. The plaintiff prayed that the copartnership might be dissolved, and an account taken of all dealings and transactions thereof, and for an injunction, and the appointment of a receiver, etc. The answer denied that the plaintiff and defendant continued as equal partners at any time subsequent to the ——— day of August, 1895, or that they were equal copartners after that date. The answer denied also that the defendant had misapplied the receipts and profits of the partnership business to his own use, or had defrauded the copartnership. The answer denied that the defendant was intrusted with the keeping of the partnership accounts, or collecting copartnership bills, or making purchases, or disbursing the funds of the firm otherwise than as plaintiff was, but admitted that defendant devoted more time and attention to these matters, as well as others of the copartnership, than did the plaintiff. The defendant denied that he failed and neglected to enter in the partnership accounts charges for services rendered to patients, and then presented bills to the same patients for services rendered by the partnership, and collected the same and applied the proceeds to his own use, without entering the collections in the partnership accounts, and charging the firm with the money so earned and collected, and denied that he had not accounted for the same. The defendant denied that he had rendered bills to patients and collected the same, and charged himself in the accounts with less than he had collected, and had not accounted for the same. The defendant denied that he had purchased supplies and

goods and charged them to the partnership, and converted the goods to his own use. He denied that he had purchased supplies for the partnership, and had credited himself in the accounts with paying for them more than the goods cost. He denied that he had collected money owing to the partnership, and had failed to charge himself with the same, or to account for the same; and he denied that he had converted the same to his own use; and he denied that he had thereby defrauded the copartnership in the sum of over \$4,000. But he admitted that he had collected and applied to his own use under the agreement mentioned in his affirmative defense, \$1,738.16, which sum he alleged was for medical services rendered mostly by himself, and that he did not enter this amount upon the firm books. He specifically denied that he fraudulently committed any of the acts or things alleged against him by the plaintiff. He pleaded as a separate answer and defense that the plaintiff and defendant entered into an equal partnership for the practice of their profession as physicians and surgeons on or about the day of March, 1889, and that it was a part of the agreement between them that each should devote his time and attention to such business, and that he had at all times faithfully complied with the said agreement on his part; but that the plaintiff, without the defendant's consent, frequently and wilfully neglected said business, and failed to comply with his part of the agreement, and by his own fault for long periods frequently was unable to comply therewith; that on or about the 25th day of August, 1895, it was understood and agreed by and between the plaintiff and defendant, in consideration of this fact, and of the fact that the defendant was doing by far the larger part of the business done by the partnership, that the defendant might, so long as plaintiff continued to

May, 1901.] Opinion of the Court — WHITE, J.

neglect said business, collect and retain such sums and amounts as would, in his opinion, compensate him for time and attention given by him to the work of the firm above that given by plaintiff; that plaintiff thereafter wilfully continued from time to time to neglect the business of the firm, and that under and in pursuance of said agreement the defendant retained, without entering the same upon the books of said firm, the said sum of \$1,738.16, itemized in schedules one and two of the answer, and no other or different sums; that the same were retained by defendant under said modified agreement, and not otherwise, and they are the same items mentioned in plaintiff's bill of particulars, which items were furnished by defendant to plaintiff after the commencement of this action. The defendant, as a further and separate partial defense, pleaded that, if there were entries upon the books of the firm of other or different amounts as being paid out by defendant than the amounts actually paid, such entries were the result of errors, and were not intentionally or fraudulently made, and that the defendant was ready and willing to account for all such errors, etc. As a further and separate answer and defense and as a counter claim the defendant pleaded the formation of the partnership, and that the plaintiff and defendant agreed that each should do and perform an equal amount of labor and service for the benefit of the firm; that the defendant had at all times faithfully complied with said agreement on his part; that the plaintiff frequently, and without the consent of the defendant, wilfully neglected said business, and failed to comply with his part of said agreement, failed to devote his time and attention to said business for long periods of time, and was frequently for long periods of time incapable of rendering any service for the benefit of said partnership; that the plaintiff, during the

summer months of each year since the year 1892, devoted a large portion of his time and attention to the conduct of a private business enterprise, to the total neglect of said partnership business, and in violation of the terms thereof; that by reason of this fact the defendant was compelled to and did perform and render more than one-half of the labor and services, and more than his equal share of the labor and services agreed to be performed by him; that the reasonable value of the labor and services so rendered and performed in excess of the labor and services agreed to be performed and rendered by him was and is \$2,100, and that the defendant has received no credit therefor. The defendant further pleaded that the plaintiff frequently, and without the consent of the defendant, wilfully neglected said business, and failed to comply with his part of the agreement, and failed to devote his time and attention to the business for long periods of time during the existence of the copartnership since 1895, to the damage and detriment of the business in the sum of \$700, which sum the plaintiff might have earned for the business during the times he neglected the same; that the plaintiff, in violation of his agreement, engaged in the business of conducting a hotel and summer resort, etc., to the detriment of the partnership in the sum of \$2,100, which sum the plaintiff might have earned for the business. As a further and separate partial answer and defense the defendant pleaded that on or about the 1st of January, 1896, an account was stated and settled between plaintiff and defendant of all matters and things relating to their copartnership business, and upon said settlement a balance of \$109.46 was found to be then due from the defendant to plaintiff, which sum was paid. As a further answer and defense defendant pleaded that on or about the 1st of January, 1895, an account was stated and

May, 1901.] Opinion of the Court — WHITE, J.

settled between plaintiff and defendant of all matters and things relating to their copartnership up to that date, and upon such settlement and accounting a balance was found to be due from the plaintiff to the defendant, which sum was allowed as a credit to the plaintiff upon the settlement made on the first of January, 1896. The reply, in substance, denied any modification of the original partnership terms, and denied also all the affirmative defenses pleaded by the defendant, except as to the accounting, and as to that the reply alleged that about January, 1896, the plaintiff and defendant undertook to ascertain how much cash each of them had received and expended during the year previous, and to equally divide the total net cash receipts during said period, but that the defendant, by the fraudulent and false entries which he had previously made in the accounts of the business, and by his fraudulent omissions to enter transactions in the account books of the partnership, which matters were unknown to the plaintiff until October, 1897, or later, and by his other false and fraudulent acts, did deceive and impose upon the plaintiff in regard to the business of the partnership, and the amount of cash the defendant had received and expended therein, and did thereby mislead and deceive the plaintiff, and thereby rendered said calculations untrue and false. The plaintiff further alleged that about January 1, 1895, the plaintiff and defendant undertook to ascertain how much cash each of them had received and expended in the partnership business during the year previous, and to equally divide the total net cash receipts during said period; but that the defendant, by the fraudulent and false entries which he had previously made in the accounts of the business, and which were then, and until about October, 1897, or later, wholly unknown to the plaintiff, and by his fraudulent omissions to enter transactions in the account books

of the partnership, which omissions were likewise unknown, and by other false and fraudulent acts did deceive and impose upon the plaintiff in regard to the business of the partnership, and the amount of cash the defendant had received and expended therein, and did thereby deceive and mislead the plaintiff, and did thereby render the said calculations untrue and false.

On the issues thus tendered the court made an order of reference to take testimony to ascertain whether the agreement of copartnership was as alleged by the plaintiff, or whether the agreement of copartnership was as alleged by defendant, as to whether there had been a modification of the agreement by the defendant, and as to whether there had been an accounting as alleged by the defendant. On the testimony taken under this reference the court found:

“That in or prior to the month of March, 1889, the plaintiff and defendant, each being a physician and surgeon, entered into a copartnership for the practice of their professions as such at and in the vicinity of Walla Walla, in the then territory, now state, of Washington, for an unspecified period of time, and without any express conditions or stipulations as to the amount of time or service that each should contribute thereto, but with the tacit understanding that each should contribute thereto his skill and service at all reasonable times, and as might be necessary for the conduct of their said partnership business during the continuance thereof, in fair and substantially equal proportions, and that they should share equally in the joint earnings, income, and profits arising therefrom, and should bear, in like proportions, the losses and expenses incident thereto.

“That said agreement was never at any time thereafter, by mutual consent or otherwise, modified by them, but continued in force during the whole of the time that they transacted business as such copartners.

“That pursuant to said agreement said plaintiff and defendant, as such physicians and surgeons, conducted

May, 1901.] Opinion of the Court — WHITE, J.

and carried on said partnership business from the time of making said agreement until on or about the 18th day of October, 1897.

“That on or about the first day of January, 1895, said plaintiff and defendant had a mutual accounting of and concerning the moneys received and disbursed by each of them during the year of 1894 and prior thereto, but of no other matters relating to their said copartnership business, and that upon said accounting there was found to be due on account of said moneys so received and disbursed by them prior to that time from said plaintiff to said defendant, the sum of \$299.49, which was assented to by them.

“That afterwards, and on the first day of January, 1896, the said plaintiff and said defendant, as such copartners, likewise had an accounting of moneys collected and disbursed by each of them prior to that time, and that upon such accounting of the moneys so received and expended by each of them from and on account of their said copartnership business prior to that time there was found to be due from the defendant to the plaintiff a balance for the year 1895 of \$408.95, and exceeding the balance aforesaid found on said preceding accounting so due from said plaintiff to said defendant, a balance of \$109.46.

“That in making said accountings said defendant fraudulently withheld, concealed, and converted to his own use divers sums of money theretofore received by him, and in divers other ways misrepresented and misstated to said plaintiff in said accountings, and each of them, the amounts so collected and disbursed by him on account of said business during the times covered by said accounts; and that he has at no time since then fully and fairly accounted to said plaintiff of and concerning the sums so received and disbursed by him during said times, nor can the same be ascertained without the taking of further evidence, and the ascertainment of the sum so fraudulently withheld, concealed, and converted to his own use.

“That said defendant has likewise since said accountings, and until the dissolution of said copartnership, fraud-

ulently received on account of the business of said copartnership divers sums of money belonging thereto, which he has fraudulently concealed, converted to his own use, and failed to enter upon the books of accounts of said copartnership, or otherwise to account to said plaintiff for and has disbursed moneys belonging to said copartnership on his own private account and made false entries thereof upon said books of account; and that the taking of further evidence in the case is necessary to the ascertainment and stating of the account between said plaintiff and defendant as such copartners.

“That said accounts so stated between plaintiff and defendant on the first day of January, 1895, and the first day of January, 1896, as aforesaid, should be, and they hereby are, reopened, and a full account of all sums of money and property belonging to said partnership received by said defendant, and not accounted for by him, and therein charged to him, be taken and stated; and if, in the taking of such account the particular items and exact amounts thereof be not shown by him, and be not otherwise ascertainable, then that the losses thereby sustained by said plaintiff be ascertained and assessed and be charged against said defendant in lieu thereof; and that for said purposes, and determining the other undetermined issues in the cause, the same be, by an order to be hereafter entered, referred back to the same referee, or be referred to some other competent person, to take further and additional testimony and evidence to ascertain said omitted items and amounts, and, in so far as he may be unable to do so, to ascertain and assess the amount of the losses sustained by the said copartnership and the said plaintiff by reason thereon and of defendant’s failure to fully and truly account therefor, and to fully state the whole account between plaintiff and defendant of and concerning their said partnership dealings, business, and concerns, and to report the same to the court with all convenient expedition.”

The court then made a reference as follows:

“It is ordered that this cause be, and it hereby is, referred back to John W. Brooks, referee, to take a full

May, 1901.] Opinion of the Court — WHITE, J.

account of all sums of money and property belonging to said partnership which the defendant has destroyed, concealed, failed to account for, or converted to his own use during the existence of the partnership, and the amount of the losses sustained by the partnership in consequence; and that in so stating the account between the plaintiff and defendant reference shall be had to the accounts of the partnership business in evidence, and the account shall be stated and ascertained up to January 1, 1895, then up to January 1, 1896, and then up to October 18, 1897, so as to show to which of said periods each disputed item belongs.

“And if, in the taking of such account, the particular items and exact amounts thereof be not shown by the defendant, and be not otherwise ascertainable, then that the losses thereby sustained by said plaintiff be ascertained and assessed and be charged against said defendant in lieu thereof and of defendant’s failure to fully and truly account therefor; the same to be separately shown and stated.”

“That said referee shall, in accordance with this order, and the findings and decisions of this court filed herein on December 5, 1898, consider the evidence and testimony already taken, so far as the same is relevant to the stating of the account, and also such further testimony and evidence as may be introduced, and for said purposes he may receive from the clerk the exhibits and testimony already taken and filed, and he shall report all the testimony and exhibits to the court with his findings of fact and conclusions of law thereon, with all convenient expedition.”

The defendant excepted to that part of the order in italics.

The final report of the referee in part is as follows:

“That the partnership books and the partnership business has been so kept, by the defendant failing to enter in the partnership books the names of persons to whom he has rendered partnership services, and by failing to enter in the partnership books and charge himself with moneys collected by him, belonging to the partnership,

and by incorrect and false entries in said partnership books, and by crediting himself with having disbursed larger sums of money on behalf of the partnership than he had really disbursed, and by closing private accounts without entering the amounts collected in the cash account of the partnership, or by showing by whom said accounts were collected, or in any manner accounting therefor, that it is impossible to make up and state a complete account between plaintiff and defendant from said partnership books.

“That the defendant has lost, destroyed, or withheld from this court all records which he made or had of the names of persons and the partnership services rendered by them, or the value thereof, and of the amounts of money collected by him for partnership services, which defendant had not entered upon the partnership books, except such record as the defendant made after the commencement of this action from memory, and from the partnership books, and filed in this cause.

“That the items so made up and furnished by defendant were not complete, and did not give a full and true account of all the items taken by defendant, and not entered upon the partnership books.

“That defendant’s methods of transacting the partnership business and of defrauding the partnership were so various, and extended over such a long period of time, that it is impossible to ascertain from extraneous evidence all the items, or the exact amount of many of the items, appropriated by the defendant to his own use from the partnership business.

“That it is impossible to make an itemized statement of account of the business between plaintiff and defendant, any further than I have done in this report.

“That the defendant has shown only a small part of the sums of money and property belonging to the partnership which he concealed and converted to his own use, and he has not shown the exact amounts, or dates, or particulars thereof. The defendant has refused to disclose or account any further than he saw fit, and has refused to examine and explain his entries in the books. While the testi-

May, 1901.] Opinion of the Court — WHITE, J.

mony does not certainly show that he secreted or destroyed the 'missing ledger' and the 'missing list of accounts,' yet in conjunction with what the evidence does show in regard to the disposition he made of other records of the business, the conclusion is that he did so. He has spoliated the accounts and records of the partnership so that the amount of the losses sustained by the partnership cannot now be certainly ascertained, *and can only be approximated by estimating from what appears in evidence in the case.*

"That as a basis for estimating the amounts of money and property belonging to the partnership which defendant has taken and converted to his own use and never accounted for, the cash receipts of the firm as shown by the books should be considered, using the earlier years of the partnership business—especially the year 1892—for comparing the later years, said year being the first year after the appointment of the firm as prison physicians, which continued until the summer of 1897; and also modifying and making an allowance for the years of the panic, commencing in 1893 and ending in 1896; and also considering the per centage of the work and money secreted and converted by him as shown by the exhibits 44 to 54, inclusive, and 121 to 135, and 138 to 140, and 142 to 147, and 150 to 155, and 157, and especially as bearing upon the last year's work."

The report further states that if the account had been stated and settled as shown by the books of the firm on October 18, 1897, when the action was commenced, there would have been a balance of \$404.95 due from the plaintiff to the defendant on account of the partnership. But from the direct evidence introduced upon the trial, and admissions of the defendant, the referee found that there was actually due from the defendant to the partnership, independent of the estimates, the sum of \$703.50 prior to January 1, 1895, \$422.95 from January, 1895, to January, 1896, \$3,251.90 from January 1, 1896, to October 18, 1897, and \$71.80 on account of errors in posting; in all, the sum of \$4,450.15. In addition to this the

referee finds that the appellant should be charged with a large amount of money and property belonging to the partnership, which he had taken and converted to his own use, and never accounted for. The referee estimates these accounts as follows: \$1,500 for the period prior to 1895; \$3,000 from January 1, 1895, to January 1, 1896; and \$5,000 from January 1, 1896, to October 18, 1897; in all, the sum of \$9,500.

The exhibits referred to in the referee's report are forty-one memorandum pads or slips upon which the defendant apparently entered his daily work and receipts before transferring the same to the partnership books. These memorandums are in the handwriting of the defendant, and were found, torn in pieces, in the waste basket of the defendant, by the attorney for the plaintiff, the night before this action was commenced. They cover a period between August 30 and October 4, 1897. A comparison of the pads with entries actually made by the defendant in the cash book shows that the defendant entered and accounted for a little over eight per cent. of the cash collected by him during the days represented by the pads. He collected for the partnership during these days the sum of \$576.60, and entered in the cash book and accounted for only \$46.50 of this sum. For the work done upon the credit of the patients, and for which charges should have been made upon the visit record book, he entered forty per cent., and kept off the books sixty per cent. The issue tendered by the defendant as to a modification of the partnership agreement by which he sought to justify his withholding from the firm large sums earned by the partnership was false, and the court below was justified in making the findings it did in this respect. We are strongly convinced, after reading the testimony on the issue as to a modification of the agreement, that it was not

May, 1901.] Opinion of the Court — WHITE, J.

tendered in good faith. Neither was there ever any honest accounting. The examination of the defendant shows that he was unwilling and evasive in explaining his failure to make proper entries in the books of the firm. We have read and examined the testimony in the case, and we regret to say that there was no disposition shown by the defendant, in testifying, to aid the referee in getting at the truth and facts necessary to state an accurate account between the partners. The findings of the referee as to the failures and shortcomings of the defendant in entering accounts and credits, and in all respects as set out in his report, which we have copied in part, are, in our opinion, fully sustained by the evidence. There is, in addition, other evidence tending to show the earning capability of the firm. The evidence discloses the fact that the plaintiff was honest in his partnership transactions, and in his entries in the partnership books and in charging himself with partnership funds, and was open and truthful in testifying to the partnership affairs, and in explaining the accounts so far as he knew. The only item in dispute in the referee's report is that which is called the "estimate of damages" suffered by the partnership by reason of the defendant's misconduct in failing to account to the firm for money reasonably supposed to have been earned by the partnership, and which, if earned, was, as can be fairly presumed from many known transactions, collected by the defendant. These sums, as found by the referee, are, \$1,500 and interest for the period prior to the year 1895, \$3,000 and interest from January 1, 1895, to January 1, 1896, and \$5,000 and interest from January 1, 1896, to October 18, 1897. If the defendant in this action, through the negligence of any one, had been rendered incapable of pursuing his calling, in a suit to recover damages for such negligence he would be entitled

to show generally what the earning capability was per annum of the firm to which he belonged, for the purpose of giving to the jury a basis upon which to estimate his loss. Why shall not the same principle be applied in this action? If the books of the firm had been kept, and accounts had been entered, the books would undoubtedly furnish the best evidence, and an accurate account could be stated therefrom. Here was a partnership, which, from its very nature, called for transactions with many people, scattered over a large area, many of the items being charges as small as one dollar. It was impossible, when this action was tried, to know or recall to mind all, or nearly all, the persons for whom the partnership rendered services; and it was impossible to call witnesses to prove the many services rendered, visits made, prescriptions given, and office consultations. The next best evidence available was based upon the annual or daily earning capacity of the firm. The torn pads, and the testimony of the plaintiff as to the amount of business done in late years, as compared with the earlier years, were used. The books and the testimony show that in the latter years of the firm more business was done, yet the money receipts grew less and less. The clientele of the firm was of the best, in one of the oldest and most prosperous farming communities in the state, and, as the evidence shows, notwithstanding hard times, accounts were generally collected, if not the first year, the following years, as the times grew better.

In the case of *Askew v Odenheimer*, 2 Fed. Cas. 31, cited by the appellant, it was averred, in answer to the complaint, that there was great mismanagement by the complainant for some years of the partnership affairs, which was concealed by false entries in the books, and that the books and papers of the firm were destroyed by

fire, so that it became impossible to ascertain the extent of the frauds committed, and that the respondent believed that he had sustained losses to the amount of five thousand dollars from these frauds; and claimed the right to retain out of the complainant's share of the partnership effects a sum sufficient to cover this estimated amount. The evidence of the destroying of some of the books and papers of the firm by fire was very clear and very strong to prove that it was wilfully done by complainant to conceal the frauds he had committed. The case was referred to a master, and in passing on respondent's exceptions to his report the court says:

"If there has been actual spoliation by a party, every thing would be presumed against him in favor of those setting up a *prima facie* title; and though there is no actual spoliation proved, yet a complete suppression would, for the purposes of the suit, be equal to a spoliation. . . . But where he comes to charge the spoiler in account, in order to raise a debt against him, *he must give some evidence beyond the fact of spoliation*, his oath would be admissible evidence, its effect depending on the circumstances of the case. If he relies on other evidence he must make out a *prima facie* case, by proof competent for a court of equity to presume, a court of law to give a judgment on a demurrer to the evidence, or a jury to find a verdict in favor of the charge set up. This is what is understood by some evidence, it may be slight, yet if it conduces to prove the charge it is legally sufficient, its weight or credibility is a matter of discretion and circumstance. No specific sum can be charged against the spoiler on proof of the mere fact of spoliation, herein the rule differs from that which applies to a claim of property under a deed or will on which the right depends, and the thing claimed is ascertained.

"The circumstances of this case would justify the utmost latitude of presumption in a court, jury, master or auditors; the fraud was premeditated, the spoliation wilfully made to conceal it, and we would not disturb a ver-

dict or report which did not at the first blush appear to have debited the complainant with items, in support of which there was no evidence, conducing to make out the charge.

“So far as the master has debited the complainant, his report is confirmed; but from the evidence returned with his report he seems to have held the defendant to proof not required by any rule, and to have withheld all credits not definitely proved, or at least to have allowed none which were not supported by such evidence as would have supported charges in an ordinary case between partners or merchant and customer. Were we to confirm this report, on a consideration of the evidence which accompanies it, it would confound all distinction between the spoiler and the despoiled, and tend to encourage rather than to suppress spoliation by throwing on the innocent party the burthen of supplying the evidence which the other had destroyed. . . . We have not thought it proper to direct any credits on the general averment in the answer that the injuries sustained amounted to 5,000 dollars; it is too vague to act upon satisfactorily. Had it been definite as to any particular fact, or the amount of injury sustained under any defined item, we might have directed a further allowance to the defendant, but it would be acting too much on vague conjecture for us to specify any particular amount. Though we should not have disturbed the report if the master had done it, we cannot feel justified in decreeing any particular charge under this general allegation.”

There was nothing in the above case but the oath of the respondent to his answer, and even then the court says that it would not have disturbed the report of the master had he made the allowance. The case at bar, so far as the proof goes, is altogether different. There is some evidence, beyond the mere fact of the suppression of the accounts and spoliation, of the gross amount the firm probably earned per annum, and there is evidence from which some estimate could be made. This makes out a *prima*

May, 1901.] Opinion of the Court — WHITE, J.

facie case from which “a court of equity may presume,” as the opinion quoted from says, in favor of the charge made; in this case, in favor of the amount found by the referee.

“If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the non-production of proper accounts is due.” 2 Lindley, Partnership (2d Am. ed.), p. 948.

“If a partner has books or accounts in his possession, and he will not produce them, an account may, nevertheless, be arrived at by presuming everything against him. Thus, in a case where an account was directed at the suit of the representatives of a deceased partner against the surviving partner, and the latter would not produce the books necessary to enable the master to take the accounts, the master estimated the net profits at 10 l. per cent. on the capital employed, and the court, on exceptions to his report, confirmed it, adding that if he had set the net profits down at 20 l. per cent. his report would have been equally confirmed.” 2 Lindley, Partnership (2d Am. ed.), p. 1177; *Walmsley v. Walmsley*, 3 Jones & L. 556.

It is a principle of universal application that each partner is, in contemplation of law, the general agent of the firm. The same rules which prevail in the dealings of an agent with his principal are applicable in the conduct of a partner when dealing with the firm of which he is a member. It is held in many cases that, where the agent is unfaithful to his trust, and abuses the confidence reposed in him, or misconducts himself in the management of the agency, he will forfeit his right to compensation. *Mechem, Agency*, §619; *Sea v. Carpenter*, 16 Ohio, 412; *Vennum v. Gregory*, 21 Iowa, 326; *Cleveland & St. Louis*

R. R. Co. v. Pattison, 15 Ind. 70; *Sumner v. Reicheniker*, 9 Kan. 320; *Brannan v. Strauss*, 75 Ill. 234.

It is not every case of misconduct, however, which will deprive him of compensation already earned. If the agent *wholly* fails to recognize the duties and responsibilities imposed upon him by his situation, or so conducts himself that his services are of no value, it is entirely just and reasonable that he should receive no compensation whatever; and to this extent the law is well settled. *Mechem, Agency*, §619. If, on the other hand, though the agent has been negligent, or has not performed according to his undertaking, his services are still of some appreciable and substantial value to the principal over and above all damages sustained by him by reason of the default, the agent is entitled to recover that value. *Mechem, Agency*, §619; *Sampson v. Somerset Iron Works Co.*, 6 Gray, 120.

“Thus, for example, it is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency; and if this duty is not faithfully performed, the omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby. Indeed, cases may occur of such gross neglect and misconduct of agents, in this respect, as to amount to a complete forfeiture of all compensation which would otherwise belong to the agency.” *Story, Agency* (9th ed.), §332.

“Courts of equity adopt very enlarged views in regard to the rights and duties of agents; and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility or of obtaining undue recompense. If therefore an agent does not under such circumstances keep regular accounts and vouchers, he will not be allowed the compensation which otherwise would belong to his agency. Upon similar grounds, as an agent is bound to keep the prop-

May, 1901.] Opinion of the Court — WHITE, J.

erty of his principal distinct from his own, if he mixes it up with his own the whole will be taken both at law and in equity to be the property of the principal until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words the agent is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal." Story, Equity Jurisprudence, §468.

In the case of *Kelley v. Greenleaf*, 3 Story, 93 (14 Fed. Cas., 238), which was a suit in equity to charge a partner with funds fraudulently converted to his own use, after quoting at length §468, Story's Equity Jurisprudence, Judge STORY says: "Every word of this passage is equally applicable to the case of a partner acting as the agent of a partnership." It is held in the case of *Gray v. Haig*, and *Haig v. Gray*, 20 Beav. 219, where the plaintiffs appointed the defendant their agent for the sale of spirits at a commission, and where the defendant had made profits by the sale of the plaintiffs' goods, for which he had not given credit, and had also made profits by selling his own spirits mixed with those of his principals, and where the agent had destroyed books of account, and where, under the contract, the agent was entitled to 7,000 l. commissions by his contract, that, where an accounting party destroys the accounts before the matters have been finally adjusted, the court will presume everything most unfavorable to him, consistent with the established facts; that if an agent, by his own conduct,

makes it impossible to ascertain the amount of profit realized, he will be disallowed the commission, which otherwise, and according to the contract, he would be entitled to claim. The following are extracts from the opinion in that case:

“In a case before me this year, one partner, several years before the institution of the suit, and upwards of twenty years after the closing of the partnership business, and when the accounts had been settled between him and his partners by arbitration, and never afterwards opened or disputed, had destroyed the books which contained the accounts of that partnership, I treated lightly the circumstance of that destruction, and did not suffer it to prejudice his case. But the case is very different when the transactions to which they relate are recent, where the accounts arising from them have not been finally adjusted, or the balance ascertained or paid, and still more when that destruction takes place by the person who has actually filed a bill to have the accounts taken of those very transactions to which these books relate. In such a case some very cogent reason must be given to satisfy the court that the destruction was proper or justifiable, and, in the absence of any such satisfactory reason, which is the fact here, I am compelled to act on the principle laid down in the well-known case of *Armory v. Delamirie*, and presume, as against the person who destroyed the evidence, every thing most unfavorable to him, which is consistent with the rest of the facts, which are either admitted or proved. . . . In the case of *White v. Lady Lincoln* the agent and manager of the property, who was also the solicitor, kept no regular accounts, or any papers from which such accounts could be made out; he kept all the vouchers which told in his own favor, but no evidence of the receipts in respect of which he was to be charged. His executors were held not to be entitled, on his behalf, to claim against the principal the charges, which, in other circumstances, he would have been entitled to make. Lord Eldon there says: ‘With respect to Jackson’s demand as auditor, steward, agent, and all

May, 1901.] Opinion of the Court — WHITE, J.

except his bills as attorney, as to all which he was bound to keep accounts of those transactions, I must lay down the rule, that a man, standing in a relation imposing a duty to keep regular accounts, cannot be permitted to make a demand for work and labour in that character, with reference to which he has kept no account; which is justified by principle, that ought to be loudly published,—that a receiver who does not pass his accounts regularly, ought not to be allowed any poundage. That principle applies to all these demands except the bills of costs.'

"In *Lupton v. White*, Lord Eldon laid down that where an agent or bailiff confounds the property of his principal with his own, he will be charged with the whole, except what he could prove to belong to himself. Lord Eldon says: 'If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice that such should not be the state of things between them, by these means preventing the guard which the court would have effectually interposed, is the argument to be endured, that, as the party so injured cannot distinguish his property, therefore he shall have nothing? That is not the law of this country as administered in courts, either of law or equity.'

"In this case the books, which would have proved the clear state of the accounts between the parties, have been destroyed by Mr. Gray after the litigation had begun. Upon the evidence before me, I see proof that, in several cases, Mr. Gray made, on the sale of the goods of his principals, a profit which he did not give credit for to them. . . . The result is, that in my opinion, Mr. Gray is not entitled to be allowed the commission which otherwise would have been his as of right. I believe, in this case, as in most cases of this description, the want of evidence operates much more prejudicially to the person who causes its removal than if the evidence had been before the court, but the rule of law and of equity, and of moral-

ity and of common sense, in all such cases, is one and the same, and it is, in my opinion, inviolable. It is of the greatest importance for the conduct of all business transactions in this country, whether commercial or otherwise, that the parties who deal together should understand, that perfect fairness and openness is that system which alone it is their interest to adopt.

“I cannot conclude this case without expressing my regret, that I have felt it my duty to make a decision on these points which will lead to so stringent a decree against Mr. Gray. It cannot, however, be too generally known or understood, amongst all persons dealing with each other, in the character of principal and agent, how severely this court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act, in all matters relating to such agency, for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect, and that the loss, and still more the destruction of such evidence, by the agent, falls most heavily on himself.”

See, also, *White v. Lady Lincoln*, 8 Ves. Jr. 371; *Lupton v. White*, 15 Ves. Jr. 439; Story, Agency, §331, and note.

“But for misconduct in the management of the business of the concern, or violation of the partners’ rights, the partner whose rights have been invaded by reason of the misconduct or negligence of his copartner may, in an action in equity to settle the partnership affairs, recover damages from his copartner which will compensate him for the loss sustained by such misconduct or negligence.” *Hollister v. Simonson*, 55 N. Y. Supp. 372.

The referee and the court below found, in effect, that the firm had been damaged in the sum of \$13,900, and interest thereon, by reason of the misconduct of, and misappropriation of funds of the firm by, the appellant. In spite of the actions of the appellant, his services were of appreciable and substantial value to the firm over and

May, 1901.] Opinion of the Court — WHITE, J.

above the damages the firm sustained by reason of his misconduct, and he was, therefore, allowed to retain his portion. In other words, the court required the appellant to restore to the firm \$13,950, and interest thereon, and then allowed him to receive one half of this as his share of the partnership assets. We think the conclusion thus reached was consonant with equitable principles.

The appellant does not attempt to show on this appeal that the estimate of \$1,500 for the period prior to 1895, and \$3,000 from January 1, 1895, to January 1, 1896, and \$5,000 from January, 1896, to October 18, 1897, is excessive. He raises the single issue of law that the plaintiff cannot recover more than one half of \$4,378, or thereabout, the gross amount of items reported by the referee as being specifically proven to have been misappropriated by the appellant. To adopt this rule would be to reward the defendant for his dishonesty, and would be against all precedent. We have examined the testimony and the report of the referee as to the facts upon which he made this estimate, and we do not feel that we would be justified in disturbing it. We cannot say that the estimate is excessive. Dr. Bingham, in his testimony, says the business kept increasing, and it would not be less than \$15,000 a year of business and money earned. In the year 1896, as shown by the books, Dr. Keylor accounted for cash \$3,857.46, and for the nine months of the year 1897 he accounted for cash in the sum of \$2,089.20. The memorandum pads show that he entered or accounted for only a little over eight per cent. of the cash shown to have been collected by him from August 30 to October 4, 1897. In his amended answer he alleged that the equal partnership agreed upon in 1888 was, in 1895, modified,—all of which was found against him in the court below,—and for this reason he justified making the entries he did which failed

to show the full amount collected, and in many instances failed to show any amount collected, although he had made collections, and he only knew from memory what he in this manner retained. There was also a missing list of accounts amounting to about \$6,000, and the evidence tends to show that a large part thereof was collected by appellant, and unaccounted for. There are many other things in the evidence upon which the referee and the court below based their conclusions. Because of the gross misconduct of the appellant, every doubtful circumstance should be construed unfavorably to his rights and interest. Story, Agency, § 333.

“Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal.” Story, Equity Jurisprudence, § 468; 2 Beach, Trusts & Trustees, § 737.

In a recent case in New Jersey it was held that, where a trustee has neglected to keep an account of his investment of the trust funds, and of his receipts and disbursements of the same, and thereby expensive litigation has been occasioned, and the courts have been deprived of means of being assured of the correctness of the accounting had, his neglect may be punished by resolving doubts against him, and also by withholding compensation from him. *Welsh v. Brown*, 50 N. J. Eq. 387 (26 Atl. 568). We have no doubt that the firm was also entitled to interest on moneys found to have been fraudulently abstracted and withheld from it by the appellant. The appellant has caused this litigation by his misconduct, and should be required to pay the costs of this action. *Hamer v. Giles*, 11 Ch. Div. 942.

As to the error claimed to have been committed in the

May, 1901.] Opinion of the Court — WHITE, J.

refusal of the court to discharge the writ of attachment, the appeal notice is to the effect that the defendant appeals from the judgment and decree rendered on the 20th of January, 1900, in favor of the plaintiff and against the defendant, for \$7,666.67. The order of January 8, 1900, overruling the motion to dissolve the attachment, is not mentioned in the notice of appeal. The respondent makes the point that under the proviso in § 6503, Bal. Code, the appellant is required to designate in the notice of appeal the order refusing to discharge the writ of attachment, and, inasmuch as that has not been done in this case, the appellant cannot under the appeal taken assign as error the order of the court refusing to discharge the writ of attachment. We do not think that the proviso under § 6503 applies when the appeal is from a final judgment and decree, as in this case. Subd. 1, § 6500, Bal. Code, expressly provides that, when the appeal is from any final judgment entered in the action, an appeal from such judgment brings up for review any order made in the same action, either before or after judgment, in case the record shall show such order sufficiently for the purposes of a review thereof. *Thompson v. Sines*, 18 Wash. 361 (51 Pac. 474).

The appellant contends that § 5359, Bal. Code, contemplates only the issuance of several writs of attachment based upon the same affidavit and bond; that the plaintiff once had full opportunity to litigate his rights to the attachment, and, as the question has been decided on the merits, and not by reason of any technical defect in the papers or proceedings, the judgment dissolving the writ of attachment heretofore entered is *res judicata* upon all questions which were or might have been litigated upon the first hearing. We gather from the record that in December, 1897, an affidavit for a writ of attachment was filed

in this cause, and that a writ of attachment was issued thereon; that a motion was made to dissolve the same, and overruled by the court; and that an appeal from such order was then taken to this court, and, after hearing, this court remanded the cause, with direction to dissolve and set aside the attachment. We have searched the record in vain for the original affidavit, and we can only infer as to what was therein set forth from the opinion of this court in *Bingham v. Keylor*, 19 Wash. 555 (53 Pac. 729). In July, 1898, a second writ of attachment was sued out, and the amended affidavit as a basis for this writ was filed in the superior court on the 9th day of October, 1899. The concluding part of this affidavit is as follows: "That plaintiff makes this amended affidavit in the matter of the writ of attachment dated July 2, 1898, and files the same by leave of the court, as by order made and entered on September 29, 1899." We are unable to find in the record the original affidavit upon which the writ of attachment was issued in July, 1898. Under § 5380, Bal. Code, the plaintiff may, at any time when objection is made thereto, amend any defect in the affidavit for the writ, and no attachment shall be quashed or dismissed if the defect can be amended so as to show that a legal cause for the attachment existed at the time it was issued. On the 29th of September, 1899, the court made an order on the first hearing of the motion of the defendant to dissolve the writ of attachment issued on July 2, 1898, allowing the plaintiff to file amended, additional, and new affidavits; and the affidavit of October 9, 1899, was thereafter filed under § 5380, *supra*. This amended affidavit, omitting formal parts, is as follows:

"I, John E. Bingham, being first duly sworn, say that I am the plaintiff in the above entitled action; that the defendant is indebted to the plaintiff in the sum of five thousand dollars over and above all just credits and off-

May, 1901.] Opinion of the Court — WHITE, J.

sets, and that this attachment is not sought and this action is not prosecuted to hinder, delay, or defraud any creditor of the defendant. That since December, 1897, and about the month of March, 1898, this plaintiff became acquainted for the first time with the facts concerning the assignment and disposition which the defendant had made of his property; and

“That the defendant has, and had on July 2, 1898, assigned and secreted, and disposed of some of his property, with intent to delay and defraud his creditors; and

“That since December, 1897, and about June, 1898, this plaintiff became acquainted for the first time with facts concerning the defendant's property, and of transactions of the defendant and of the purposes of the defendant, and avers that the defendant is, and was on the 2d day of July, 1898, about to convert a part of his property into money, for the purpose of placing it beyond the reach of his creditors; and

“That the defendant has been guilty of a fraud in incurring the obligation for which this action was and is brought. That the defendant and plaintiff entered into a partnership about September, 1888, for the purpose of practicing their professions as physicians and surgeons, as equal partners, and that in pursuance thereof they continued said partnership until the commencement of this action, October 18, 1897. That on the formation of said partnership they immediately commenced keeping accounts of the business thereof, and agreed mutually to enter in the partnership accounts books all the business, and to correctly keep such accounts. That about —, in the year 1892, the defendant planned and fraudulently conceived a scheme to cheat and defraud the partnership and his co-partner, this plaintiff, and that at said time in 1892, and during all the time thereafter until October 18, 1897, in pursuance of said plan and scheme, and with the fraudulent intent to deceive and cheat the partnership and his copartner, this plaintiff, and without the knowledge or assent of this plaintiff, the defendant did purposely and fraudulently do each and all of the following acts and things, to-wit:

“(1) He did purposely omit to enter in the partnership accounts charges for services rendered patients by the partnership, and then he did fraudulently present bills to said patients for said services, and did fraudulently collect the money therefor, and did fraudulently convert the money to his own use, and did fraudulently not enter the money so collected in said accounts, or charge himself therewith, or in any way account for the money.

“(2) He did likewise render bills to persons for services rendered them by the partnership, and did fraudulently collect the same, and did then charge himself in the accounts with less than he collected, and did fraudulently convert the excess to his own use, and did not account for the same.

“(3) He did purchase supplies and goods and fraudulently caused them to be charged to the partnership, and then fraudulently converted the goods to his own use.

“(4) He did fraudulently credit himself upon the partnership account books with having paid demands against the partnership, which demands he knew the partnership did not owe, and did thereby defraud the partnership.

“(5) He did purchase supplies and goods for the partnership, and fraudulently credit himself in the accounts with paying for the goods more than the goods cost.

“(6) He did fraudulently transfer claims and demands of the partnership to persons whom the partnership owed, and got credit on the partnership debt therefor, and then did fraudulently credit himself in the partnership accounts with having paid the amount in his own money, and did thereby defraud the partnership.

“(7) He did fraudulently and falsely represent to the plaintiff that he was compelled to pay money for the partnership to satisfy demands against the partnership, which demands he knew the partnership did not owe, and did thereby defraud the partnership and this plaintiff.

“(8) He did fraudulently collect money owing to the partnership with the fraudulent intent to convert the same to his own exclusive use, and then did fraudulently convert the same to his own use, and did fraudulently fail to en-

ter the same in the accounts and charge himself therewith, or account for the same.

“That the defendant, in the foregoing manner, and by the aforesaid methods, and in pursuance of the aforesaid scheme to defraud the partnership and the plaintiff, and with the fraudulent intent to convert the money to his own use as aforesaid, did fraudulently collect and did fraudulently convert to his own exclusive use the sum of more than ten thousand dollars owing to and belonging to said partnership, and did fraudulently conceal that he had done so, and did fraudulently deceive this plaintiff in regard thereto, and did fraudulently fail to account for the same to said partnership. That many of the facts and the proofs thereof, showing that the defendant was guilty of a fraud in incurring the obligation for which this action is and was brought, were ascertained for the first time by this plaintiff after December, 1897, and during the months intervening between said December, 1897, and July 2, 1898, and the proofs of many of said facts were only obtained by means of the process of this court in taking testimony before the referee in this case between May 10, 1898, and April 30, 1899, as appears by said testimony on file in this case. That the receiver of the partnership has collected, and now has in his hands, enough money to pay all the debts and expenses outstanding of the said partnership and of his receivership. That upon an accounting in this action by the defendant and the plaintiff of the business of the said partnership, there will be a balance due to the plaintiff from the defendant by reason of the aforesaid fraudulent acts of the defendant of five thousand dollars over and above all just credits and offsets; and that this action is brought to compel said defendant to account for said money so fraudulently obtained and fraudulently converted to his own use, and to compel him to pay the same to plaintiff. That plaintiff makes this amended affidavit in the matter of the writ of attachment dated July 2, 1898, and files the same by leave of the court, as by order made and entered on September 29, 1899.”

The opinion in *Bingham v. Keylor*, *supra*, states that the grounds for the attachment in the original affidavit

were: First, that the defendant was about to dispose of his property with intent to defraud his creditors; second, that the defendant had been guilty of a fraud in incurring the obligation for which the action was brought. The only matter, so far as it affects the case now under consideration, passed upon by the court in that case, was that the defendant could not be said to be guilty of a fraud in incurring the obligation for which the action was brought, because he failed to charge himself with, or otherwise account for, moneys collected by him belonging to the partnership; and on this question alone is the judgment in the first attachment conclusive. We think that successive writs of attachment may issue under § 5359, Bal. Code, and that under § 5380, Id., the affidavit may be amended so as to set forth grounds unknown to the plaintiff at the time of filing the original affidavit, or facts subsequently discovered, even if they existed at the time of filing the original affidavit, if reasonable diligence had been used in the first instance to discover the same. Section 5380, *supra*, not only provides that the attachment law shall be liberally construed, but that “no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has been *or can be* amended so as to show that a legal cause for the attachment existed at the time it was issued.” Under a liberal construction of this section, we do not think the rule that all questions which might have been litigated under the order dissolving the first writ will be considered as litigated has any application. The doctrine of *res judicata* is, in general, not strictly applicable to motions, but the courts have in its place adopted rules, which, in the prevention of the reargitation of *the same matter*, operate substantially like the rules of *res judicata*, so far, at least, that the decision of a motion heard upon the merits is con-

clusive of a subsequent motion in the same case *proceeding upon the same grounds*. But, even when such a rule is permissible, a motion will be opened on the question being changed by new facts discovered or arising afterwards. 1 Freeman, Judgments (4th ed.), § 326. The motion to dissolve the first attachment was denied by the court below in 1897, and reversed by this court June 28, 1898. The affidavit of October 9, 1899, sets forth that the plaintiff first became acquainted with the facts concerning the assignment and disposition which the defendant had made of his property in March, 1898, and then states an entirely new ground for the writ, to wit: "That the defendant has, and had on July 2, 1898, assigned, and secreted, and disposed of some of his property with intent to delay and defraud his creditors." The ground for the writ issued in December, 1897, was "that the defendant is about to dispose of his property with intent to defraud his creditors." There is also set forth in the affidavit of October 9, 1899, that about June, 1898, the plaintiff became acquainted for the first time with facts concerning the defendant's property and of transactions and purposes of the defendant; and in this connection the affidavit avers an entirely new ground for the writ, to wit: "that the defendant is and was on the 2d of July, 1898, about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors."

The averment "that the defendant has been guilty of a fraud in incurring the obligations for which this action was and is brought" is in the affidavit of December, 1897, and while it may be conceded that all questions of fraud relative to moneys collected by the defendant on account of indebtedness due the partnership are *res judicata*, yet the new facts of fraud in incurring the obligation for which the action is brought set forth in the third, fourth,

fifth, and seventh specific charges under this head, in the affidavit of October 9, 1899, were not passed upon in *Bingham v. Keylor, supra*, and from the affidavit, as well as from an additional affidavit of Dr. Bingham filed on November 9, 1899, it may be fairly inferred that these new facts were unknown to the plaintiff in December, 1897, and could not have been discovered by reasonable diligence; and as to these, under the circumstances, the rule of *res judicata* does not apply. The defendant filed on October 18, 1899, an affidavit controverting the affidavit of the plaintiff of October 9, 1899. The record of the court below on the motion to dissolve the writ is as follows:

“This cause came on regularly to be heard. The said plaintiff appearing by Ed W. Bingham, Wellington Clarke, and George T. Thompson, his attorneys, and defendant appearing by John L. Sharpstein, and W. T. Dovel, his attorneys, and thereupon the defendant, in support of his motion to dissolve said writ of attachment of July 2, 1899 (8), read the following affidavits, towit:

“The affidavit of Howard R. Keylor, filed the 16th day of September, 1899; the affidavit of H. R. Keylor, filed the 27th day of September, 1899; the affidavit of H. R. Keylor, filed the 19th day of September, 1899; and the record upon the motion to dissolve the writ of attachment issued herein on the ——— day of December, 1897, consisting of the statement of facts settled, and all affidavits referred to in said statement of facts, together with the opinion and order of the supreme court dissolving said writ of attachment; copies of all of said foregoing affidavits and proceedings being hereto attached and made a part of this statement of facts, and the plaintiff read in evidence the following affidavits: Affidavit of J. E. Bingham, filed on the 25th day of September, 1899, and the affidavit of J. W. Langdon, filed on the 28th day of September, 1899; affidavit of J. E. Bingham, filed on the 9th day of October, 1899; amended affidavit of J. E. Bingham, for attachment, filed on the 9th day of October, 1899; affidavit of Clark McLean, filed on the 28th day of September, 1899;

May, 1901.] Opinion of the Court — WHITE, J.

affidavit of A. R. Burford, filed on the 9th day of October, 1899; affidavit of J. E. Bingham, on the 3rd of November, 1899; and also presented and filed three certified copies of deeds and two certified copies of tax rolls; copies of all of which said affidavits, deeds, and tax rolls are hereto attached, and made a part of this proposed statement. And no evidence other than the foregoing was offered on behalf of said plaintiff, or on behalf of the said defendant, and thereupon, and after argument of respective counsel, the court took said matter under advisement, and afterwards, and on the 8th day of January, 1900, made an order overruling said motion to dissolve said attachment. To the overruling of which said motion said defendant then and there duly excepted."

In the affidavit of Dr. Bingham of September 25, 1899, detailing various things in support of the affidavit for the writ of attachment issued in July, 1898, the affiant says: "That, as evidence that the said Howard R. Keylor has been guilty of a fraud in incurring the obligation for which this action was and is brought, the affiant refers to the testimony and exhibits taken and filed in this suit in this court."

Under § 5376, Bal. Code, the defendant may, at any time after he has appeared in the action, apply on motion for the discharge of the writ. Under § 5377, Bal. Code, "If the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits *or other evidence* in addition to those on which the attachment was issued." If it *satisfactorily* appears that the writ of attachment was improperly issued, it must be discharged. Bal. Code, § 5378. When the court below is called upon to determine facts on a motion to discharge the writ of attachment, every presumption must be in favor of the conclusion reached by that court, unless the contrary clearly appears. We do not know from the record whether or not the court below, in passing on

this motion, considered the testimony taken in the case. It was referred to in one of the affidavits on file. It would not have been improper to have considered it, under § 5377, Bal. Code. In one of the plaintiff's affidavits it is set forth that defendant sold a part of his property to the Cumberland Presbyterian Church for \$2,500 in cash; that the property was worth \$4,000; and that this was done for the purpose of converting the property into money, in order to place it beyond the reach of the plaintiff. This was denied by Dr. Keylor. The court below, however, had a right to weigh these conflicting affidavits in the same way that a jury would weigh conflicting statements; and it had the right, if it considered the testimony in the case, to disbelieve Dr. Keylor. Many other facts and circumstances were set forth in detail by affidavits having a tendency to support the affidavit for the writ of attachment. It is unnecessary to particularize. It does not appear to us that the court below erred in holding that there were satisfactory grounds for the writ of attachment issued in July, 1898.

The final judgment and decree of the court below is therefore in all respects affirmed.

REAVIS, C. J., and FULLERTON, DUNBAR and ANDERS, JJ., concur.

[No. 3418. Decided May 8, 1901.]

N. H. LATIMER, *Respondent*, v. FRANK W. BAKER,
Appellant.

NON-SUIT — WHEN GRANTABLE — CONTRADICTORY EVIDENCE.

Where there is any contradiction in the evidence, it is the province of the jury to determine the facts, and, under such circumstances, a non-suit should be refused.

May, 1901.]

Opinion Per Curiam.

EVIDENCE — ADMISSIBILITY OF WRITTEN ASSIGNMENT.

In an action by plaintiff as the assignee of the claim of one to whom forged county warrants had been sold to recover from defendant the amount paid therefor, which claim, the complaint alleges, had been assigned in writing by plaintiff assignor to plaintiff for a valuable consideration, the assignment would not be inadmissible in evidence from the fact that it was signed by both the assignor and his wife, when there was no evidence establishing that the wife was a real party in interest.

WITNESSES — EXAMINATION AS TO FORMER TESTIMONY.

Where a witness has been cross-examined as to his testimony in another case, respecting the subject matter of his present examination, it is not error to allow the party introducing him, on re-direct examination, to interrogate him further in relation thereto and as explanatory thereof.

SAME.

Objection to the cross-examination of a witness as to his testimony in another case concerning the purchase of forged warrants was properly sustained, where the question related to other warrants than those involved in the present suit, though the dealings in regard to all the warrants had been between the same parties.

Appeal from Superior Court, King County.— Hon. ORANGE JACOBS, Judge. Affirmed.

Ira Bronson and Burke, Shepard & McGilvra, for appellant.

Stratton & Powell, for respondent.

PER CURIAM.—Respondent brought this action against appellant, and alleged in his complaint that on the 28th day of December, 1896, the appellant sold to one John Goodfellow, for the sum of \$793.50, certain warrants purporting to be genuine warrants of Chehalis county, state of Washington, and then and there warranted said warrants, and each thereof, to be valid and binding obligations of said county in the amounts and upon the conditions stated therein, respectively, whereas in truth said warrants were not genuine warrants of said county, but were forger-

ies. It is further alleged that by reason of the foregoing facts there was an entire failure of consideration for the payment of the aforesaid sum, and that the said Goodfellow was thereby damaged in said sum; that thereafter said Goodfellow, for a valuable consideration, assigned in writing to respondent his said claim and demand against appellant; and that respondent is now the owner and holder thereof. Judgment is demanded for said sum of \$793.50, with interest thereon at the legal rate from the 28th day of December, 1896. The answer denies the averments of the complaint. A trial was had before a jury, and a verdict was returned by the jury in favor of respondent in the sum of \$916.62. Appellant moved for a new trial, which was denied, and he thereupon appealed to this court.

The first assignment of error is that the court erred in not granting appellant's motion for a non-suit. It is urged that the respondent's evidence showed that appellant, Baker, was simply the agent for one Jameson in the transaction of selling the warrants, and that he was known to be such by Goodfellow, the respondent's assignor. The testimony of Goodfellow tends to show that he may have known such to be the fact concerning some warrants previously bought by him of Baker, but it is not sufficiently clear that he knew such to be the fact concerning these warrants to have justified the court in taking the case from the jury. It is also argued that the testimony of Goodfellow shows that he was not acting for himself in the purchase of the warrants, but as the agent of his wife, by reason whereof he was not the party in interest in the purchase of the warrants, as alleged in the complaint. The check which Goodfellow gave to Baker in payment for the warrants is signed "J. Goodfellow, Agent," and Goodfellow testified that his wife's money was deposited in a bank

May, 1901.]

Opinion Per Curiam.

account under that name. He also testified that all money which he used in his business transactions was deposited in that account. It does not appear from the testimony that Mrs. Goodfellow had knowledge of the warrant transaction at the time they were bought, or that she was in any way connected with it. Her husband simply checked against her bank account in payment for the warrants,—an account in which he also kept all money which he used in his business. The written assignment from Goodfellow to respondent is signed by both Goodfellow and his wife, and it is argued that the instrument therefore shows upon its face that Goodfellow was not the party in interest. The assignment in the body thereof shows upon its face, however, that it is a transfer of the claim arising out of the particular warrant transaction heretofore mentioned; and since Mrs. Goodfellow was not shown to have been in any way connected with the matter, save as it might be inferred from the fact that the check was made upon a bank account in which her money was kept, we do not think the fact that she signed the written assignment along with her husband is sufficient to establish her identity as the principal, and that of her husband as her agent, in the purchasing transaction. The transaction was conducted personally between Baker and Goodfellow, and even if it were true in fact that the wife was the principal and her husband the agent, it does not appear that any such disclosure was made to Baker at the time the warrants were sold by him. Baker dealt with the husband and knew him only in the matter. An agent who has not disclosed his principal has a right of action in his own name. *Mechem, Agency*, § 755. We therefore think the motion for nonsuit was properly denied.

The second assignment of error is that the court erred in not granting the appellant's motion to set aside the ver-

dict and to grant a new trial, and the third assignment is that it was error to enter a judgment against the defendant upon the verdict. For the reasons heretofore given, and for the further reason that an examination of the whole of the evidence discloses sufficient contradiction to make it the peculiar province of the jury to determine the facts, we think the court did not err in the particulars last above assigned, unless it appears that material error was committed upon the admission or rejection of offered testimony. It is assigned as error that the court admitted in evidence, over appellant's objection, the written assignment heretofore mentioned, for the reason that it was signed by Mrs. Goodfellow. It is urged that the fact that she signed it shows that she was the purchaser of the warrants, and, since such fact was not pleaded in the complaint, the instrument is therefore inadmissible. For reasons heretofore given, we think the instrument was properly admitted. The fact that Mrs. Goodfellow signed it along with her husband in no way changed the relations of the parties as they existed. When it was shown that Goodfellow signed the paper, it was immaterial who else may have signed it, unless it was shown by other evidence that such other signer was a real party in interest; and even then the paper itself must have been admitted and the jury left to determine the fact as to who was the actual purchaser.

It is next urged as error that the court overruled the objections of appellant to certain questions propounded to Goodfellow by respondent's counsel, as to what he had testified during another trial concerning the purchase of these warrants. The questions were asked upon redirect examination, after appellant's counsel had interrogated the witness as to his former testimony; and respondent's counsel sought to extend the examination by his redirect questions in explanation of the force and meaning of the witness's

May, 1901.]

Opinion Per Curiam.

former testimony, to which allusion had been made during the cross examination. The objection is urged mainly upon the ground that the testimony of the witness in this case cannot be supported by showing what may have been his testimony in another case. The objection upon that ground would be well taken if the questions had been propounded upon direct examination, but, after the fact of this former testimony had been developed by the cross examination, the respondent certainly had a right to interrogate the witness further in relation thereto and as explanatory thereof. It appears that a former suit had been brought by the same plaintiff against the same defendant, and concerning the sale of the identical warrants involved here. That suit was waged upon the theory,—and it was so alleged in the complaint in that action,—that Goodfellow, as agent for Baker, sold the warrants to Latimer. At the conclusion of the plaintiff's testimony in that case the court granted a non-suit on the ground, as we suppose from what we gather from the record, that the evidence of Goodfellow showed the transaction to have been a direct one between Baker and Goodfellow, wherein Goodfellow himself bought the warrants from Baker, and that Baker afterwards sold them to Latimer. It appears that after the non-suit in the former action, this suit was brought upon the theory that Goodfellow was not the agent of Baker, but was the actual purchaser of the warrants. Under these circumstances, respondent had a right upon redirect examination to ask the witness as to his further recollection of his former testimony, by way of testing the accuracy of his testimony before the jury in this case.

It is next contended that the court erred in sustaining respondent's objection to certain questions propounded to witness Goodfellow by appellant's counsel, concerning his testimony at the trial of the other case. The objection was

based upon the ground that the particular portion of the former testimony of the witness referred to in the questions related to other warrants than those involved in this suit. We think it is sufficiently clear from the record that such was the fact, and the objection was therefore properly sustained. The court, in its instructions, plainly told the jury that they were to determine from the evidence the fact whether Goodfellow bought the warrants from Baker as principal, or from Baker as agent for Jameson; that if they found that Baker was acting as agent for Jameson, and that such fact was known to Goodfellow at the time, respondent could not recover; that if they found that Baker acted as principal or as agent for Jameson without disclosing the fact of such agency, and that such fact was not known to Goodfellow, then no express warranty that the warrants were genuine need be proven, as the law implies such warranty. We think the issue was squarely and properly submitted to the jury both upon the evidence and the court's instructions.

Since we find no prejudicial error in the record, the judgment is affirmed.

[No. 3503. Decided May 9, 1901.]

PETER SELDE, JR., *Respondent*, v. LINCOLN COUNTY,
Appellant.

25	198
29	6
25	198
130	703

HIGHWAYS — ESTABLISHMENT BY COUNTY COMMISSIONERS — REVIEW
ON APPEAL.

The matter of establishing a road being by Laws 1895, p. 82, left wholly to the discretion of the board of county commissioners, and their action in that respect being the exercise of *quasi* legislative authority, the refusal of the board to establish a road upon petition therefor does not present a question which the superior court can review on appeal, since that court cannot take

May, 1901.] Opinion of the Court—WHITE, J.

cognizance of cases requiring the exercise of other than purely judicial power. (*Hull v. Stephenson*, 19 Wash. 572, distinguished).

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

N. T. Caton, Prosecuting Attorney, for appellant.

Martin & Grant, for respondent.

The opinion of the court was delivered by

WHITE, J.—Peter Selde, Jr., presented his petition for the location and establishment of a county road in Lincoln county to the board of county commissioners of that county, accompanying the same with his bond, as required by law, conditioned to pay all costs in the event the road was not established. The board of county commissioners appointed viewers and surveyor to survey the proposed road, and these viewers made their report, and the same was filed with the board. A time was set for hearing thereon, and notice of the same was given to all parties interested. On such hearing the road was rejected by the board, and the costs taxed to Peter Selde, Jr., the principal petitioner, who executed the bond. From the order rejecting the road Peter Selde, Jr., appealed to the superior court for Lincoln county, and in his notice of appeal recites that the board of county commissioners wrongfully refused to establish the road, and rejected the same, and taxed the costs up to said Selde. Said notice further recites that said appeal is taken from all the proceedings had in said road matter, and the whole thereof, and especially from the order that said petition be rejected and all the costs be taxed against the principal petitioner, which was made by the board of county commissioners on July 15, 1899. A motion was filed in the superior court of Lincoln county, by

the attorney for Peter Selde, Jr., in which he asked leave to file his complaint in the matter, and in which he might designate Lincoln county as defendant. This motion was *ex parte*, and the court made an order in the words following:

“This cause coming on *ex parte* to be heard upon the above motion, and after considering the same, Peter Selde, Jr., is hereby allowed to file his complaint in this matter as plaintiff, and to make the county of Lincoln, state of Washington, defendant therein.”

A complaint under such order was thereupon filed in said court by Peter Selde, Jr., as plaintiff, against Lincoln county, Washington, E. D. Kellogg, A. E. Stookey, and H. S. McNeily, commissioners of said county, defendants. The complaint, after omitting formal parts, is as follows:

“First. That at all the times herein mentioned the county of Lincoln was and is a duly organized and acting county in and for the state of Washington, and that the commissioners above named were the duly elected, qualified, and acting board of commissioners in and for said county and state.

“Second. That on or about the 1st of March, 1899, the above plaintiff duly presented a petition for the laying out and establishing of a road in said county, which is hereby referred to and made a part of this complaint, which said petition is in all things as required by the laws of the state of Washington, and properly signed, and then and there presented with said petition his bond therefor, which was accepted by said board, which said petition asks that a road be established as described therein.

“Third. That said board approved said petition and duly appointed reviewers thereon, who afterwards viewed said road and filed their report and map of the same, which said report was favorable to the establishing of said road; and said board then and there set July 15, 1899, as the time of hearing said petition, and caused notice thereof to be given to all concerned, and, after ascertaining that

May, 1901.] Opinion of the Court—WHITE, J.

said notice was given after they met on said day to hear said petition, said board heard the same.

“Fourth. That the only question for said board to decide at said hearing is, is the road practicable, and is it of general use and public utility?

“Fifth. That said proposed road is practicable and will be of general use and public utility.

“Sixth. That said board at said hearing wrongfully disallowed said road and taxed the costs to the plaintiff herein, who appealed therefrom to this court.

“Seventh. That in said matter said board made the following order, to-wit: ‘In the matter of the petition of Peter Selde, Jr., *et al.*, for the establishing of a county road, the board having heard and considered all the evidence adduced for and against the establishment of said road and being fully advised in the premises, it is therefore ordered that said petition be rejected and all the costs be taxed against the principal petitioner. Dated Saturday, July 15, 1899.’ That the plaintiff is the principal petitioner in said petition, and said board made the above order contrary to the law and the evidence adduced at said hearing.

“Wherefore plaintiff prays that said order be reversed, and that said board be by this court ordered to establish said road, and that the costs as taxed against said plaintiff be taxed against the proper party, and for all other relief.”

To this complaint a demurrer was interposed on the following grounds: (1) That said complaint does not state facts sufficient to constitute a cause of action, nor sufficient facts to entitle plaintiff to the relief therein demanded. (2) The court has no jurisdiction of the subject-matter, and no authority to hear or determine the matters sought to be adjudicated. This demurrer was overruled. Subsequently the defendant filed a motion to strike plaintiff’s complaint from the files, because the same was filed without warrant of law and the court had no jurisdiction to grant the same, which motion, after argument of counsel, was refused by the court. The defendant refused to further plead, and its default was by the court entered. On November 13, 1899, the court called a jury to whom was

submitted the testimony of Peter Selde, Jr., and John Riley, witnesses on behalf of the plaintiff; and two verdicts were found and returned into court, as follows: First, A general verdict in these words: "We, the jury duly impaneled to try the above action, find for the plaintiff." Second, A special verdict in the following words: "We, the jury duly impaneled to try this action, find the following facts fully proven: (1) That the plaintiff in this action was and is the principal petitioner herein, and as such duly presented his petition to said defendant for the construction of a road therein described; (2) that a day certain was set for the hearing of said petition before said commissioners, and the same was wrongfully disallowed by them; (3) that the said road, as petitioned for by plaintiff, is and was a practicable one, of public utility and general use."

While the court was charging the jury, the defendant requested the court to instruct the jury that they had no power to establish a county road, and they must therefore find for the defendant. The court refused this instruction, and indorsed the same as follows: "The county attorney refused to further plead after ruling on demurrer, and took no part in the trial. The court had commenced to charge the jury when this instruction was handed up, and requested that it be given to the jury, which is refused." The court made and entered final judgment as follows:

"This cause coming on to be heard in open court upon application of plaintiff to try this action upon the issue of fact joined herein; and the same being duly set for trial on this the 13th day of November, 1899, as provided by the rules of this court and the law of the state of Washington; a jury of twelve men was called, and accepted and sworn to try the cause; and, after hearing the testimony from the witnesses and the law from the court, said jury returned the following verdict: 'We, the jury duly impaneled to try the above entitled action, find for the plaintiff. P. H. Dolan, Foreman.' And the following special verdict, to-wit: 'We, the jury duly impaneled to try the

May, 1901.] Opinion of the Court—WHITE, J.

above entitled action, find the following facts fully proven: (1) That the plaintiff in this action was and is the principal petitioner herein, and as such duly presented his petition to said defendant for the construction of a road therein described; (2) that a day certain was set for a hearing of said petition before the commissioners, and the same was wrongfully disallowed by them; (3) that the said road as petitioned for by plaintiff was and is a practical one, of public utility and of general use. P. H. Dolan, Foreman.'

"Now, on this the 16th day of November, 1899, this cause coming on to be heard upon application of plaintiff for a judgment upon the foregoing verdict, and it appearing to the court that no motion for a new trial had been made by the defendants, and that the time thereof had expired.

"Now, therefore, the said application is hereby granted; and it is ordered, adjudged, and decreed that the road petitioned for by plaintiff and which was refused by defendant, be, and the same is hereby, and the order appealed from by the plaintiff made by the county commissioners of Lincoln county, Washington, as set out and described by plaintiff in his complaint, be, and the same is hereby, revised and set aside; and the said board is hereby ordered and commanded to set aside said order, and enter therein instead an order allowing said road, and they are hereby ordered to make such further orders as is necessary to establish said road, and are expressly ordered to reverse all orders by you made, adjudging cost against this plaintiff; and it is further ordered and adjudged that the plaintiff do have and recover of and from the defendant his cost in this action, taxed at \$29, and the clerk of this court is hereby directed to serve a copy of this judgment upon the board of county commissioners in and for Lincoln county, Washington.

"Done in open court this the 16th day of November, 1899."

Proper exceptions were taken by the defendant to the overruling of the demurrer to the motion to strike the complaint, and to the refusal of the court to give the instruc-

tion requested by the defendant, both of which are assigned as errors, together with the assignment that the court erred in submitting to the jury the three questions upon which a special verdict was sought and had. It is also assigned as error that the court erred in assuming jurisdiction to adjudicate the matter submitted in the complaint.

The law establishing boards of county commissioners provides that "Any person may appeal from any decision or order of the board of county commissioners to the superior court of the proper county." The manner of giving notice, bond, etc., on such appeal is pointed out. The law then provides that "The practice regulating appeals from and writs of certiorari to justice's courts shall, *so far as the same may be applicable*, govern in matters of appeal from the decision or order of the board of county commissioners." Bal. Code, § 359. No other regulation is made as to what shall be heard upon appeal. The statute regulating appeals in justice's courts provides that the superior court shall become possessed of the cause, and shall proceed in the same manner, as near as may be, as in actions originally commenced in that court. Bal. Code, § 6758.

There are cases in which the board of county commissioners exercises power conferred upon it, such as passing upon an ordinary claim for damages, or for work done for the county, where an appeal to the superior court from an order rejecting such claims will bring up the matter for hearing *de novo* in that court. In such cases the court may perhaps order pleadings to be made up as in this case, and the action would then be tried as if originally commenced in the superior court. There is, however, a distinction between cases of the kind indicated, and matters where the board is clothed with discretionary, legislative, ministerial, and like powers.

"It is, . . . not every question tried in the inferior

May, 1901.]

Opinion of the Court — WHITE, J.

tribunal that is open to contest on appeal. A general rule of law precludes the court to which the appeal is taken from reviewing the judgment of the inferior tribunal upon matters committed to its discretion. In many instances the statute provides that the decision of the tribunal which first assumes jurisdiction shall be conclusive upon certain designated questions, and whenever this is done, either expressly or impliedly, the question must, of course, be deemed conclusively adjudicated." Elliott, Roads & Streets, p. 276.

The mere use of the term "appeal" in the statute affords no certain guide as to its effect. The general policy of the law, and reasons drawn from analogy and from practical consequences, must be resorted to, to determine its operation. *Dutcher v. Culver*, 23 Minn. 415. County roads are laid out and established by order of the county commissioners, on petition of a certain number of householders. Viewers are appointed to view, lay out, and survey the proposed road. The board of commissioners is to decide, on the coming in of the report of the viewers, "as to whether the road shall be established in accordance with the report of the viewers, or otherwise, or at all." Laws 1895, p. 86, § 12. The matter of establishing the road is left wholly to the discretion of the board of county commissioners, and necessarily so, for the board of commissioners is charged by the law with the duty of managing the county funds and business. Bal. Code, § 342. The cost of construction and damages incident to establishing the road are matters which must always be taken into consideration by the commissioners, as well as the financial condition of the county treasury, and there must necessarily be the exercise of discretion to a great extent in the paying out of funds for the construction of county roads. Ordinarily, juries are not called upon to pass on such questions. What are the limitations upon appeals to the superior court from the decision of the board of county commissioners? The

superior court exercises only judicial power; hence appeals from the board of county commissioners to the superior court must be limited to such cases as require the exercise of purely judicial power, and therefore when the board of county commissioners exercises political power, or legislative power, or administrative power, or discretionary power, or purely ministerial power, no appeal involving a trial *de novo* will lie. *Fulkerson v. Stevens*, 31 Kan. 125 (1 Pac. 261). It may be that under an appeal from such an order or decision, the superior court would have power to inquire into questions of jurisdiction, the regularity of the proceedings of the board of commissioners, and its compliance with the forms of law, but not to try the case as if originally brought in that court. The views here expressed may seem to be in conflict with a former decision of this court, *Hull v. Stephenson*, 19 Wash. 572 (53 Pac. 669). The reasons upon which we base our present views do not seem to have been considered in that case. In *Hull v. Stephenson*, *supra*, the board of county commissioners made an order vacating a road, an appeal was taken from that order to the superior court, that court dismissed the appeal, and the question which was brought to this court was on the order of the court below dismissing the appeal. The only questions before this court in that case were: Was the order an appealable order? Had the appellant the legal capacity to take an appeal to the superior court? We have already indicated that such an order might be appealable, so far as to inquire thereunder into questions of jurisdiction, etc.,—the appeal taking the place of the writ of *certiorari*, to a certain extent; and this view is strengthened by the fact that the practice regulating writs of *certiorari* to justices' courts governs under the express provision of the statute allowing appeals to the superior court from orders or decisions of boards of county commission-

May, 1901.]

Syllabus.

ers. *Tiedt v. Carstensen*, 61 Iowa, 334 (16 N. W. 214). The county commissioners in establishing roads exercise *quasi* legislative authority, and the superior court on appeal is not authorized to revise or control the actions of the board of commissioners in this respect. *Commissioners' Court of Lowndes County v. Hearne*, 59 Ala. 371; *Quinchard v. Board of Trustees of Alameda*, 113 Cal. 664 (45 Pac. 856); *King County v. Neely*, 1 Wash. T. 241.

It seems, from the special verdict of the jury and the final judgment in this case, that the only question sought to be reviewed was the exercise of discretion by the board of county commissioners in establishing the road petitioned for. From what we have said in this opinion, this question was not open on its merits for review. The judgment of the court below is therefore reversed and set aside, and this cause is remanded, with instructions to dismiss the appeal taken from the decision of the board of county commissioners at the cost of said Peter Selde, Jr. The appellant to recover its costs, also, on this appeal.

REAVIS, C. J., and FULLERTON, DUNBAR and ANDERS, J.J., concur.

[No. 3512. Decided May 11, 1901.]

A. POTTER, *Respondent*, v. CITY OF WHATCOM, *Appellant*.

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — PAYABLE FROM SPECIAL FUND — LIABILITY FOR FAILURE TO CREATE FUND.

Where a contract for the improvement of a street provides that the cost thereof shall be payable out of a special fund arising from an assessment of the property benefited, the mere fact that the amount realized from a valid assessment according to benefits was inadequate to meet the cost of the improvement would not render the city liable for the difference out of its general fund.

25	207
26	88
25	207
27	262
25	207
28	648
128	654
25	207
34	659
35	378
25	207
42	378

SAME — FAILURE TO OBJECT BEFORE CITY COUNCIL — REVIEW BY COURTS.

The question of the inadequacy of an assessment for a street improvement to cover the cost of the improvement cannot be raised in a collateral proceeding to recover upon the warrants issued by the city in payment of the expense of the improvement, since it conflicts with the rule that all questions affecting the assessment proceedings, not going to the jurisdiction of the city to make the assessment, must be taken before the city council pending confirmation by that body, and an appeal taken from its determination, before the courts will inquire into the regularity or sufficiency of the proceedings.

Appeal from Superior Court, Whatcom County.—Hon. HIRAM E. HADLEY, Judge. Reversed.

C. H. Hurlbut, T. E. Cade and Newman & Howard, for appellant.

S. A. Callvert, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The respondent brought this action against the appellant to recover upon certain street-grade warrants. To the answer to the complaint a demurrer was interposed, which the trial court sustained; and, upon the appellant's refusal to plead further, judgment was entered against it in accordance with the prayer of the complaint. The city brings the cause here. From the record it appears that the appellant is the successor of the former city of New Whatcom and the city of Whatcom, which were consolidated in 1891; that prior to the consolidation the old city of New Whatcom, by ordinance passed in conformity to its charter, ordered that so much of Elk street, in that city, as lay between Alder street and the south boundary of the city, or Tyler street, should be improved in accordance with certain plans and specifications theretofore prepared by its city engineer; that the contract for the work was let to W. G. Fleming & Co., who performed the same

May, 1901] Opinion of the Court.—FULLERTON, J.

according to the plans and specifications; and that the city, in compliance with its part of the contract, issued to them warrants aggregating the sum of \$26,376.51, \$19,928.98 of which were drawn upon a special fund, called the "Fund for the Improvement of Elk street from Alder street to Tyler street." The former city of New Whatcom thereafter levied an assessment upon the property fronting upon the improved street for the purpose of meeting these warrants. This assessment was made without regard to benefits, and was never attempted to be enforced by the officers of the city levying it, or the appellant city of New Whatcom. In 1897 the appellant caused a reassessment of the property fronting upon the improvement to be made according to benefits, when it was found that the original cost of the improvements exceeded the amount of the benefits—the sum that could be lawfully assessed against the property liable to be specially assessed therefor—by the sum of \$6,518.98. This assessment was, after notice, duly confirmed by the city council. Appeal therefrom by certain parties interested was taken to the superior court, which adjudged the procedure of the city council regular and valid, and on appeal to this court the judgment of the superior court was affirmed. See *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 231 (54 Pac. 774, 55 Pac. 630). The respondent holds the warrants sued upon by assignment from W. G. Fleming & Co. While it appears that a considerable part of the sum assessed yet remains unpaid, and that the city has instituted proceedings to enforce its payment, it also appears that there are outstanding warrants, antedating the respondent's warrants in their order of issuance, sufficient to absorb the entire fund created by the special assessment, and that when these warrants are paid nothing will be left of the fund to apply on the warrants sued upon.

Under what circumstances a municipal corporation will become generally liable for the payment of warrants drawn upon a special street improvement fund, where the fund itself has not been made available for the payment of the warrants, is a matter that has been frequently before this court for determination. In *German-American Savings Bank v. Spokane*, 17 Wash. 315 (49 Pac. 542, 38 L. R. A. 259), the court exhaustively reviewed its former decisions, cited and reviewed many cases from other jurisdictions, and announced what it conceived to be the correct principle governing the question. It was there ruled that the municipality was not liable for the payment of such warrants out of its general fund, unless the contract expressly made it liable, or the municipality had collected the special fund and misappropriated it. This ruling, it was confessed, was not in harmony with some of the prior decisions of the court, but it was also shown that these decisions did not agree one with the other; and it was the object and purpose of the then chief justice, who prepared the opinion in that case, to set the matter at rest, and announce a rule which would serve as a guide for the determination of future cases. Since that time the court has adhered to the principles of that decision with substantial uniformity. In *Wilson v. Aberdeen*, 19 Wash. 89 (52 Pac. 524), the action was to recover upon warrants issued against a special street improvement fund. The municipality had failed to make the special fund available for the payment of the warrants, and it was conceded by both sides that it was without its power so to do. The appellant insisted that because of this fact the city was liable for the payment of the warrants out of its general fund. The court denied the liability of the municipality, and in passing upon the question, after citing the case of *German-American Savings Bank v. Spokane*, *supra*, used the following language:

“It is not clear whether the remedy was lost in consequence of the exhaustion of the property covered by the special liens which was of any value or whether it was barred by lapse of time, but it would not make any difference. We regard all of these latter questions as immaterial, and view the contract as one binding the city to pay only from the special fund as stated. And whatever the fact may be, for the purposes of this case we adopt the concession that the remedy to prosecute the assessments is no longer available. But, notwithstanding this, we do not think the city should be held liable for the reasons set forth in the case referred to, although the question was not expressly decided in the opinion, it not being necessary. But the reasons for deciding against the plaintiff there apply with equal force against the plaintiffs here, although the special remedy is lost. The obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and, if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences. They were bound to take notice of what was being done in the premises, or of any failure to proceed. If the property was exhausted and proved to be inadequate, that loss can not be imposed upon the general taxpayers.”

In *Potter v. New Whatcom*, 20 Wash. 589 (56 Pac. 394, 72 Am. St. Rep. 135), the other phase of the rule was presented. The municipality had collected the special assessment and turned the money into its treasury, after which it was converted by the treasurer. It was ruled that the municipality was responsible to the warrant holders for the safe custody of the money, and was liable out of its general fund because of the conversion. In *North Western Lumber Co. v. Aberdeen*, 22 Wash. 404 (60 Pac. 1115), both phases of the question were presented. The action was brought to recover upon warrants, certain of which could not be paid because the fund upon which they were drawn

had not been made available, and certain others because the municipality had paid warrants subsequent in their order of issuance to the complainant's warrants, exhausting the fund out of which the warrants were properly payable. It was there held that the municipality was not liable for the payment of the first class mentioned out of its general fund, but was so liable for the payment of the second. In line with these cases may be cited the cases holding that a municipality, where it contracts for a street improvement by the terms of which payment for the improvement is to be made out of a special fund created by assessment upon the property benefited, does not incur a debt, within the meaning of the constitutional provision prohibiting municipalities from incurring an indebtedness in excess of one and one half per centum of the assessed value of the taxable property within its jurisdiction. *Baker v. Seattle*, 2 Wash. 576 (27 Pac. 462); *Soule v. Seattle*, 6 Wash. 315 (33 Pac. 384, 1080); *Winston v. Spokane*, 12 Wash. 524 (41 Pac. 888); *Faulkner v. Seattle*, 19 Wash. 320 (53 Pac. 365); *Fogg v. Town of Hoquiam*, 23 Wash. 340 (63 Pac. 234).

But it is said the facts of the case before us take it out of the rule of the cases cited, and bring it within the rule of the case of *Philadelphia, etc., Trust Co. v. New Whatcom*, 19 Wash. 225 (52 Pac. 1063). In that case it appeared that the municipality, in making a reassessment to cover the cost of a street improvement, had failed to include in such reassessment anything more than the face amount of the warrants drawn against the fund, thus making no provision for the accumulated interest. The municipality was held liable for the payment of the interest out of its general fund, on the principle that it had undertaken to make the reassessment, and was bound to "do its full duty in the premises, and make such reassessment

May, 1901] Opinion of the Court.—FULLETON, J.

for a sum sufficient to meet the full obligation of its contract." If there is a sound distinction between the rule of that case and the rule of the cases first cited, we cannot think the case at bar falls within it. There the municipality had ample power, so far as the record disclosed, to make the amount of the reassessment ample to cover not only the principal sum named in the contract, but the accumulated interest as well, while in the case before us it is shown that the sum that could be lawfully assessed upon the property benefited fell short of the principal sum named in the contract by several thousand dollars. But we do not think the case can be distinguished from the cases first referred to on any sound principle. To hold that a municipality will become liable out of its general fund for the payment of warrants drawn upon a special fund, if it attempts in good faith to make the special fund available, but fails in part of accomplishment because of the neglect or omission of some detail on the part of its officers, and that it will not become so liable if it fails and neglects to act in the matter at all, certainly cannot be justified by any correct reasoning. More than this, the decision is in conflict with the rule repeatedly announced by this court, both prior and subsequent to that time, to the effect that all questions affecting the assessment proceedings, not going to the jurisdiction of the municipality to make the assessment, must be taken before its council on the hearing pending the confirmation of the assessment proceedings by that body, and appealed therefrom to the courts, before the courts will inquire into their regularity or sufficiency. *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131 (47 Pac. 236); *New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181 (51 Pac. 360); *Heath v. McCrea*, 20 Wash. 342 (55 Pac. 432); *Annie Wright Seminary v. Tacoma*, 23 Wash. 109 (62 Pac. 444); *McNamee v. Tacoma*, 24 Wash. 591 (64 Pac. 791).

Applying the rule of the cases first cited to the case before us, it is clear that the appellant is not liable to pay the warrants sued upon out of its general fund. It neither expressly contracted to so pay them, nor did it collect the fund and misappropriate it. Nor can the respondent in this action question the regularity or sufficiency of the assessment proceedings. His remedy for any wrong done him in those proceedings was to complain to the city council while that body was sitting to hear complaints, and, if he failed to obtain relief there, appeal therefrom to the courts.

The judgment is reversed and the cause remanded, with instructions to enter judgment for the appellant.

REAVIS, C. J., and ANDERS and WHITE, JJ., concur.

[No. 3417. Decided May 13, 1901.]

PATRICK DOLAN, *Appellant*, v. J. H. SCOTT, *Respondent*.

LANDLORD AND TENANT — ACTION FOR RENT — RES JUDICATA.

Where a tenant under a lease for one year abandoned the premises at the end of the first month, and, in an action by the landlord for the second month's rent, judgment was rendered in defendant's favor on the ground that the lease was invalid, such judgment is *res judicata* in a subsequent action brought by the landlord at the end of the year for the use and occupation of the premises for the balance of the term of eleven months during which the tenant was alleged to have been in constructive possession.

SAME — TENANCY AT WILL — TERMINATION — NOTICE — LOSS OF PERSONAL PROPERTY — LIABILITY OF TENANT.

A tenant under a void lease being merely a tenant at will is privileged to terminate his tenancy at any time without notice, and in such case is not liable for the loss of personal property included in the lease whose loss occurred after his abandonment of the premises, and during the period for which the landlord was attempting to hold him to the terms of the lease.

May, 1901.] Opinion of the Court.—ANDERS, J.

JUDGMENT OF SUPERIOR COURT—CONCLUSIVENESS ON APPELLATE TRIBUNAL.

The fact that a judgment in a former action was for an amount which would render it unappealable to the supreme court, would none the less constitute it a bar in the latter court in a subsequent action between the same parties involving the same subject matter.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

T. N. Allen and Phil. Skillman, for appellant.

George C. Israel, for respondent.

The opinion of the court was delivered by

ANDERS, J.—In the month of May, 1897, Mary J. Dolan was the owner of, and together with her husband, Patrick Dolan, executed to Scott & Quinn a lease of, the saloon, furniture, and fixtures situated on the corner of Fourth and Washington streets, in the city of Olympia. The lease was for the term of one year commencing on the 10th day of July, 1897, with a monthly rental of \$43, payable in advance. The lessees paid the first month's rent, took possession of the premises, and retained possession thereof until the 9th day of August following, when they abandoned the property and tendered possession thereof, with the keys, to plaintiff, which tender was refused. Subsequently Quinn died and this action is prosecuted against J. H. Scott, surviving partner of the firm of Scott & Quinn, and as administrator of the estate of Quinn, deceased. On the 10th of August, 1897, the lessors made a demand for the amount of the rent alleged to be due for the month ending September 10th, which was refused. On the 11th day of August, 1897, plaintiff commenced an action in the justice's court for the installment of rent alleged to be due in pursuance of the terms of the

lease. In due time the case reached the superior court on appeal, was tried by a jury and a verdict rendered for the defendant, upon which a judgment was subsequently entered which was not appealed from. Plaintiff, after the expiration of the lease, took possession of the property and commenced this action in the superior court for use and occupation for the entire eleven months, and also, as a second cause of action, to recover the value of certain personal property which was included in the lease, but which he failed to find when he repossessed himself of the premises. The defendant answered, admitting the material allegations of the complaint, but, as an affirmative defense, alleged the illegality of the contract, on the ground that the premises were, with the knowledge and consent of plaintiff, rented for the purpose of conducting a gambling house, and also pleaded, as *res judicata*, the judgment in the former suit for the second month's rent. The reply denied this affirmative defense, and the case went to the jury, a verdict was rendered for the defendant on which judgment was entered, and the plaintiff appeals.

It is contended by the appellant that the validity of the lease was not determined in the former suit, and also that the defendant is liable for rent for the entire eleven months, by reason of having entered into possession under the lease and not having given thirty days' notice of his intention to terminate the same. In other words, it is claimed that a tenancy from month to month was created by the acts of the respondent, notwithstanding the terms of the lease. If the plea of *res judicata* is allowed to avail the defendant, it will not be necessary to consider the appellant's assignments of error. It seems to us, if we have properly understood appellant's theory of this case, that he has taken inconsistent positions. If the lease was valid, and the defendant took possession under it, of what avail

May, 1901.] Opinion of the Court.—ANDERS, J.

would thirty days' notice of his intention to vacate have been? Parties cannot terminate a valid contract by simply giving notice of their intention to do so. In the former suit the action was commenced strictly upon the contract to recover the second month's rent in advance, and the only material issue was the validity of the lease. It is true that the complaint alleged possession by the defendants, but we think that was an immaterial issue; for, if the lease was valid, "it would make no difference whether they were actually in possession or not."

In *Danziger v. Williams*, 91 Pa. St. 234, the court says:

"This was an action of debt, brought to recover the second quarter's rent upon an alleged lease of a building for one year, at a rental of \$1,600, payable quarterly in advance; the rent in controversy falling due July 1st, 1877. By agreement filed, jury trial was dispensed with, and the case submitted to the court under the Act of Assembly. The defendant pleaded in bar a former action between the same parties, in the same court, . . . for which a prior quarter's rent, under the same lease, had been demanded, and in which there was an award of arbitrators in his favor, unappealed from. A failure to recover one quarter's rent would not necessarily preclude a recovery for a subsequent quarter. As an illustration, the defense of payment might be a good defense to an action for the first quarter, and yet fail as to the second. But if the first action was defeated exclusively upon a ground which denied the right of action, it would be a good plea in bar to a suit brought to recover subsequent rent under the same lease. No authorities are needed for so plain a proposition."

Substantially to the same effect are *Burdick v. Cameron*, 42 N. Y. Supp. 78, and *McClung v. Condit*, 27 Minn. 45 (6 N. W. 399).

In *Cromwell v. County of Sac*, 94 U. S. 351, it is held that, except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually

required to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the issue; and the same view was expressed by this court in *Sayward v. Thayer*, 9 Wash. 22 (36 Pac. 966). Mr. Greenleaf says the rule should apply to that which was directly in issue, and that the record is conclusive as to everything material and traversable.

The fact that the former case was not appealable—the amount involved being less than \$200—does not render that case any the less a bar to the present, for the simple reason that a court of competent jurisdiction determined in that case adversely to the appellants the very question which this court is called upon to determine in this action. If the action had been commenced after the month had expired, actual occupancy might have been an issue, in which event the jury might have found the lease void, and still have rendered a verdict in appellant's favor for use and occupation. *Silverstein v. Stern*, 21 La. An. 743.

The appellant, however, claims that he is not suing on the lease, but simply for use and occupation; but, to maintain an action for use and occupation, it is necessary to prove either an entry under a valid contract, in which event the defendant would be constructively in possession, even though not occupying the premises, or actual possession. It seems clear to us that the question of the validity of this lease was determined in the former suit, and that that decision was conclusive upon that point. When the respondent took possession on the 10th of July under the void lease, he became a tenant at will. Wood, *Landlord & Tenant*, § 15; *Withers v. Larrabee*, 48 Me. 570.

A lessee holding under an invalid lease is liable for rent on an implied verbal agreement. *Kinsey v. Minnick*, 43 Md. 112; *Howard v. Carpenter*, 11 Md. 259; *Anderson v. Critcher*, 37 Am. Dec. 72.

We deem it unnecessary to cite authorities to the point that the law does not imply an agreement to pay for that which one has not received; and in this case it is only claimed that the defendant was in constructive possession. In Wood's Landlord & Tenant, § 18, and notes, it is stated, in effect, that either party may put an end to a tenancy at will at any time and *instanter*, without notice, unless the statutes require notice; and, as there is no statute in this state requiring a tenant to give notice of his intention to terminate such a tenancy, he could in any event only be held liable for damages which might result to the property, or for loss thereof, by reason of his abandonment without notice. The appellant had notice, however, and there is nothing in the record showing that the notice was not sufficient to enable appellant to properly protect the property against loss; hence, if any loss occurred, it must be attributed to his own default.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 3481. Decided May 18, 1901.]

VERMONT LOAN AND TRUST COMPANY, *Appellant*, v. JOHN T. VAUGHON *et al.*, *Respondents*.

APPEAL — REVIEW OF EQUITABLE CAUSE ON INSUFFICIENT RECORD — REVERSAL.

Appellant is entitled to a reversal of a cause of equitable cognizance, and a new trial in the court below, when he seeks such relief instead of a trial *de novo*, where the record as transmitted to the supreme court clearly shows that the judgment entered was not justified by the evidence as certified by the trial judge, and when the record raises a doubt as to whether the statement of facts contains all of the evidence upon which the cause was tried in the court below.

Appeal from Superior Court, Whitman County.—Hon. WILLIAM McDONALD, Judge. Reversed.

A. E. Gallagher, for appellant.

M. O. Reed, for respondents.

PER CURIAM.—This is an appeal from a judgment entered for the respondents in an action brought by the appellant to foreclose a mortgage upon certain real property. The action is one of equitable cognizance, which this court would ordinarily try *de novo* upon the record, and would, if it reversed the judgment appealed from, direct the proper judgment to be entered. The record as transmitted to this court, however, while it clearly shows that the judgment entered was not justified by the evidence as certified by the trial judge, leaves it in doubt whether the statement contains all of the evidence upon which the cause was tried in the court below, and whether the judge did not make the certificate to the effect that it did so under a misapprehension of his powers and duty with respect to the matter. But whether we would, under any circumstances, try a cause *de novo* on such a record, we are not called upon to determine. The appellant asks only for a reversal and that the cause be remanded for a new trial. As, on the face of the record, he is entitled to a reversal, the order will go as requested.

Reversed and remanded for a new trial.

May, 1901.] Opinion of the Court.—FULLERTON, J.

[No. 3582. Decided May 25, 1901.]

CITY OF TACOMA *et al.*, Appellants, v. ROBERT BRIDGES,
Commissioner of Public Lands, Respondent.

INJUNCTION — ILLEGAL EXERCISE OF POWERS BY STATE OFFICERS —
RIGHT OF TAXPAYER TO RESTRAIN.

A taxpayer and citizen suing in a private capacity cannot maintain a suit to enjoin a state officer from committing a breach of his public duty, without showing that he will suffer an injury thereby differing in kind from that suffered by the public at large.

SAME — REMOTE INJURY.

A complaint in an action by a municipality and one of its citizens to enjoin a state officer does not state facts sufficient to constitute a cause of action when it alleges, in substance, that defendant, in excess of his powers, threatens to lease certain of the public lands of the state, and that the lessees thereof will commit a nuisance on the leased lands which will operate injuriously to the health of the individual plaintiff and to the health of the inhabitants of the municipality, since the threatened injury is too remote to authorize the interference of a court of equity.

Appeal from Superior Court, Thurston County.—Hon.
OLIVER V. LINN, Judge. Affirmed.

W. H. Pritchard, Walter M. Harvey, William P. Reynolds and Emmett N. Parker, for appellants.

Thomas M. Vance, Assistant Attorney General, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The appellants, who were plaintiffs below, brought this action against the commissioner of public lands, praying for injunctive relief. A demurrer was sustained to their amended complaint, whereupon they refused to plead further, and judgment of dismissal and for

costs was entered against them. The material parts of the complaint are as follows:

“1. That the city of Tacoma is a municipal corporation and city of the first class, duly organized and existing under the laws of the state of Washington.

“2. The plaintiff, Seamore A. Crandall, is a citizen and taxpayer of the said city of Tacoma, county of Pierce, state of Washington, and is the owner of the following described real estate, situate in the county of Pierce, state of Washington, to-wit: Lots seven (7) and eight (8) in block eighty-five hundred and ten (8510), in the city of Tacoma, as shown by the plat of the Tacoma Land Company's First addition to said city of Tacoma, on file in the office of the auditor of said Pierce county; and lives in a dwelling-house upon said lots with his family, and that said lots are immediately adjoining and contiguous to section sixteen, township twenty, range three east, in said Pierce county, Washington.

“3. Plaintiffs further allege and show that the defendant is the commissioner of public lands of the state of Washington, and as such officer has posted and published a certain notice, a true copy of which is hereunto attached, marked ‘Exhibit A’; and in pursuance of said notice he threatens to, and he will, unless restrained by this court, receive bids for the leasing of lands in said section sixteen, township twenty, range three east, situated in the county of Pierce, state of Washington, and within the corporate limits of the plaintiff, the city of Tacoma; and will execute and deliver to the bidders therefor written instruments purporting to lease certain portions of said section sixteen, containing pretended descriptions of land, the same as in said notice set forth; such bidders and pretended lessees will thereupon and thereafter proceed to squat upon and occupy certain portions of said section sixteen, and will erect and construct cheap temporary dwellings and outhouses thereon; and will, under the pretended authority of said defendant Bridges, use the soil and surface of said land for the deposit of night soil and the excrement of human beings and animals, and thereby dis-

May, 1901.] Opinion of the Court.—FULLERTON, J.

ease germs will be bred, disease will be fostered and promoted, and the waters draining from said section sixteen will be contaminated and polluted, which waters are being used, and must necessarily be used, by the plaintiff, the city of Tacoma, to supply its inhabitants; and the health of the inhabitants of said city will thereby be greatly endangered.

“4. Plaintiffs further allege and show that said section sixteen is the property of the state of Washington, and belongs to the common-school fund of said state; that said defendant Robert Bridges threatens to, and he will, unless restrained by the order of this court, file in the office of the auditor of said Pierce county, Washington, a pretended plat of said school lands, purporting to divide the same into blocks, with streets and alleys intervening, and make a pretended acknowledgment of said plat, and thereby undertaking and purporting to dedicate to the public a large portion of said section sixteen, to be used as public highways for streets and alleys, and thus undertaking and purporting to dispose of a large portion of said section sixteen by voluntarily making a gift and a donation thereof to the public, in direct violation of the positive terms of the laws and constitution of the state of Washington, and without any right or authority so to do; and thereby a cloud will be cast upon the title of said lands, and the plaintiff Seamore A. Crandall and other taxpayers of said state will suffer great and irreparable injury.

“5. Plaintiffs further allege and show that the defendant is acting, in making said plat and in undertaking to lease said lands, solely under the authority of a pretended act of the legislature of the state of Washington, entitled ‘An act to provide for the selection, survey, management, reclamation, lease and disposition of the state’s granted, school, tide, oyster and other lands, harbor areas, and for the confirmation and completion of the several grants to the state by the United States; creating a board of appraisers and a board of harbor line commissioners, as required by articles 15 and 16 of the state constitution, which shall be generally known as the board of state land commissioners; defining their duties, and making an ap-

propriation therefor, and declaring an emergency,' passed on the 1st day of March, 1897, which act, plaintiffs allege, is in conflict with the constitution of the state of Washington, and is void and confers no authority upon the defendant.

"6. Plaintiffs further allege and show that to make a pretended lease of said lands, or any of them, according to the description in said notice set forth, would be merely to cast a cloud upon the title of said lands, and could not be effectual as a lease, because of the insufficiency and uncertainty of said description."

The exhibit referred to in the complaint and attached thereto is a copy of a notice published by the respondent, giving notice that he would on a day therein named offer for lease to the highest bidder certain tracts of land designated by number, being parts of the section sixteen mentioned in the complaint. The demurrer was upon two grounds: (1) That the plaintiffs had no legal capacity to sue; and (2) that the complaint did not state facts sufficient to constitute a cause of action.

In our opinion the demurrer was rightly sustained. Whatever may be the rule elsewhere, it is the rule in this state that a taxpayer and citizen suing in a private capacity cannot maintain a suit to enjoin a state officer from committing a breach of his public duty, without showing that he will suffer an injury thereby differing in kind from that suffered by the public at large. *Jones v. Reed*, 3 Wash. 57 (27 Pac. 1067); *Birmingham v. Cheetham*, 19 Wash. 657 (54 Pac. 37). The complaint in the case before us shows no such special injury. Stripped of its verbiage, the allegations found in the complaint amount to no more than this: That a state officer, in excess of his powers, threatens to lease certain of the public lands of the state, and that the lessees thereof will commit a nuisance on the leased lands, which will operate injuriously to the health

of the individual complainant and to the health of the inhabitants of the municipal complainant. This does not amount to an averment that the acts of the respondent directly threaten an injury to the complainants, or that the necessary consequences of his acts will be to injure them. At most, it is an averment that he is putting others in a position where such others may, if they so will it, act in such a manner as to result in an injury to the complainants. The threatened injury is, therefore, too remote to authorize a court of equity to enjoin the respondent from making the leases, if he is acting within his powers, and consequently too remote to require the court to enter upon the inquiry whether or not he is threatening to act in excess of his powers.

The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

WHITE, J., concurs in the result.

[No. 3708. Decided May 25, 1901.]

M. E. TRAVER, *Respondent*, v. SPOKANE STREET RAILWAY COMPANY, *Appellant*.

STREET RAILROADS — COLLISION WITH VEHICLE — RIGHT TO USE OF STREETS — DUTY TO LOOK AND LISTEN.

Failure to look and listen before crossing the track of an electric railway in a public street, where the cars have not exclusive right of way, is not negligence as a matter of law; but the duties of both motorman and driver of a vehicle in the exercise of care to avoid collision are mutual, with the qualification that cars cannot turn from their course, nor can they stop with the same promptness or facilities as ordinary vehicles.

SAME — ACTION FOR NEGLIGENCE — NON-SUIT.

Before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so

25	225
26	611
26	618
26	614
25	225
27	241
27	592
25	225
30	349
31	376
25	225
35	607
25	225
40	288

palpably negligent that there can be no two opinions concerning them.

SAME — PLEADING — GENERAL AND SPECIFIC ALLEGATIONS — PROOF.

Where there is a general allegation of negligence followed by an averment and enumeration of specific acts, proof will not be confined to the acts so specified, unless the complaint clearly indicates that it was the intention of the pleader to limit the charge of negligence to such specific acts.

SAME — INSTRUCTIONS — HARMLESS ERROR — GROSS AND WILFUL NEGLIGENCE.

An instruction that if defendant's employee wilfully allowed an electric car in his charge to run unimpeded up to the time when a collision was inevitable, then the verdict should be for plaintiff, is not prejudicial error, although there was no allegation or proof of wilful injury, when the complaint was broad enough to admit proof of gross negligence and there was evidence from which it might be inferred, and it appears that the instruction as given was evidently intended to cover gross negligence and that the jury were not misled by the use of the term "wilful."

SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action to recover for injuries caused by the collision of a street car with a buggy, which was driven upon the track in an effort to get round a loaded truck, an instruction that the driver of the buggy was not bound to pass around the truck or wagon in front of him on the left rather than the right (which would carry him over the street car track), provided a man of ordinary prudence, under the circumstances as appeared to the plaintiff at the time, might have pursued the course he did, is not faulty as being either a comment on the evidence, or as telling the jury that the plaintiff could choose either the safe or unsafe way in passing the truck, since it was a question for the jury to determine, under the mutual rights of plaintiff and defendant to the use of the street, whether plaintiff was chargeable with negligence in driving upon the track at the time he did.

SAME — JUDICIAL COMMENT ON EVIDENCE.

A charge to the jury that plaintiff was not guilty of contributory negligence in failing to drive directly across the track, instead of undertaking to turn and drive along the track, provided an ordinarily careful and prudent person, under the excitement and particular circumstances surrounding the plaintiff at the time, might have adopted the course pursued by him is

May, 1901.]

Syllabus.

not objectionable on the ground of being a comment on the evidence.

INSTRUCTIONS — CONSTRUCTION AS A WHOLE — MISLEADING IN PART.

An instruction which might be deemed misleading, if taken alone, will not be held prejudicial where it appears that, when construed in connection with the other instructions given, it could not have misled the jury.

SAME — RELEVANCY OF EVIDENCE.

A requested instruction that if the jury find "that the plaintiff was not thrown out of his buggy by the collision with the car, but was dragged out by holding onto the lines, when if he had not so held on to them he would not have been dragged out, then your verdict must be for the defendant," was properly refused, where the evidence tended to show that the wheel of the buggy caught in the fender of the car; that the car and the horse were pulling the buggy in different directions; that the cross tree broke; and that this was the reason plaintiff was pulled out of his buggy.

SAME — VOLUNTARILY INCURRING DANGER TO SAVE PROPERTY.

An instruction that plaintiff had no right to attempt to save property, if such attempt would endanger him or his person, and it was his duty to use ordinary care in preserving himself, notwithstanding property might be injured if he abandoned it, was properly refused where the evidence showed that plaintiff was injured, while driving a buggy, as the result of a collision with a street car, which was running at a high rate of speed, but unnoticed by him until he had driven on the track, and, instead of jumping out, he endeavored to save both himself and property by turning the horse and buggy off the track.

EVIDENCE — EXPERT TESTIMONY — MOTORMEN.

Upon an issue as to the rate of speed at which an electric car was running at the time of its collision with a buggy, witnesses are competent as experts to testify as to the distances in which a car, going at various rates of speed, could be stopped, when it appears from their examination that they had previously handled electric motor cars, were familiar with their operation, and had either observed the kind of motor in use on the car in question, or had received instructions as to its operation; it being for the jury to determine the weight to be given to such evidence.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Stephens & Bunn, for appellant.

F. T. Post and *T. B. Higgins*, for respondent.

The opinion of the court was delivered by

WHITE, J.—The appellant, at the time of the injury complained of, operated in the city of Spokane a street railway by electricity. The respondent alleged in part in his complaint, that on the 16th day of March, 1899, the appellant was running a car in a westerly direction on Front avenue, and respondent was, at the same time, traveling in his buggy in an easterly direction on said avenue, and, at a point about one hundred feet west of the intersection of Bernard street with Front avenue, respondent was in the act of crossing appellant's track, when appellant so negligently and unskillfully conducted itself in the management of said car that, through the negligence of appellant and its servants in running and managing said car, the same was then and there run by appellant and its servants with great force upon and against respondent's buggy in which he was riding, and in consequence thereof the buggy was overturned and respondent was thrown to the ground, whereby he was injured; that, at the time appellant's car collided with respondent's buggy, the car was being run by appellant at a higher rate of speed than eight miles an hour, and that no bell was rung or other warning of the approach of the car given by appellant; that, by ordinance of the city of Spokane, within the fire limits (where the accident occurred), it was provided that no motorman, conductor, or other person should move any car on a street railroad track at a higher rate of speed than eight miles per hour, or at a greater rate of speed than twelve miles per hour outside said fire limits. The answer to the complaint was a general denial and the plea of contributory negligence. The respondent testified substantially as follows:

That he first became a resident of Spokane Falls (now Spokane) in 1881, and had lived in that city for the last two years before the accident; that on the 16th of March, 1899, he was driving eastward on Front avenue, between Washington and Bernard streets, on the north side of the avenue and left hand side of the railway track, and that he had traveled the better part of a block behind a loaded dray or truck, close up to the truck; that, the movement of the truck being slower than he liked, he concluded he would pass it, so he turned to the right of the truck, which act necessarily brought the wheel of his buggy astride of the left track of the street car; that he got his horse about straightened to the right of the truck,—when he was to the right of the hind wheel of the truck,—when he saw in the distance a street car coming *at an unusual rate of speed*; that this impressed him and, on the spur of the moment, he checked his horse at once; that, as he was more to the left side of the track than the right, he naturally turned back the way he came; that he was watching the car to see if it checked its speed; that he could not observe anything of that kind at all until it got very near to him; that he was alarmed at the rate of speed at which the car was coming, and did the best he could to get his horse off, but before he entirely got clear of the track the car fender struck the hind wheel of his buggy in a slanting way, so that it lifted it, then it appeared to let go, and then it seemed to move on, and tilted up the buggy, and he was spilled out and fell upon his shoulder. He was in an open buggy, driving a single horse. He could not say how fast the car was running, but it seemed to him that it was running faster than he had ever seen a street car run; that when he first saw the car it was about one hundred and fifty feet from him. “Question: Did you see the car as soon as you drove from behind the truck?

Answer: Well, I was guiding my horse, and perhaps my horse got straightened before I saw it." The truck was not in the way in pulling the horse back. When he saw the car he kept himself busy trying to get off the track, and he thought he did his best to get off the track. *He did not look or listen for a car before driving on the track.* When he got on the track he saw the car and realized his dangerous position. He first saw the car when the front wheel of his buggy was on the track, and the horse's head was then to the right of the hind wheel of the truck; that he considered that he could get off quicker by turning back, in place of driving across the track; that he checked his horse suddenly, and was scared when he saw the car coming; that it was nearer back than across. He did not jump out of the buggy because he wanted to save everything. He had hold of the lines. The cross piece to which the singletree of the buggy was attached broke at the time the fender lifted up the wheel of the buggy. He held on to the lines as the horse was going obliquely away from the track. "Question: Now, is it not a fact that those lines—holding on to them,—is what pulled you out of that buggy? Answer: Not at all; it was safer to hold on to them than to let go." The truck was a loaded truck. The load on the top of the truck was so high that it obscured the view in front. It was up grade from Bernard street to Division street, but where the accident happened it was level. The car was about the center of Bernard street when respondent saw it. He presumed there was sufficient space within the curb of the street and the truck to have passed the truck on the left, but that the main width of the street was to the right of the truck, and, presuming the street to be clear, he thought it better to take it; that he was not attempting to cross to the south side of the street; he was attempting to drive around the truck, but there was

not room for him to pass the truck without going on the track. He had followed right behind the truck, probably a block. He did not hear any bell of the car ring. He was not absent-minded when driving, but looked ahead. His fear was caused because the car was going at more than ordinary speed; that, if the car had been going at an ordinary speed, he could have gone across or back safely. "Question: You did not know what was the ordinary or what was the excessive rate of speed at that time, then? Answer: Oh, just catching it with my eye. I knew what was usual and what was unusual." The motorman commenced stopping the car when he got pretty near. The car did not stop with the wheel on the fender, but went a little by. The car shoved the buggy out so that it was clear of the car when the car stopped. The buggy was a few inches over five feet wide; the truck was about seven feet wide. From the north rail of the track to the curb on the north side of the street was about twenty-five feet. While he was behind the truck he could look up but could not be sure as to what was in front. His shoulder was dislocated by the accident. There was testimony for respondent, from passengers on the car, tending to show that the car was running at the rate of thirteen or fourteen miles per hour until it reached the Bernard street crossing, except when it slowed up for switches or to pick up passengers, and that at the Bernard street crossing it slowed up to about half that rate, at which last rate the car was moving when the buggy was struck; that the car ran seven or eight feet after it struck the buggy; that the car was a double-trucked, heavy car, twenty-five or thirty feet long. One witness says the car was running "unusually fast" just before the accident occurred. "Question: How came you to be noticing the speed of the car? Answer: We were going so fast. Q. Now, it had slowed down at Di-

vision street, and then started up very rapidly after it crossed,—is that it? A. Yes. Q. Going faster than the usual and ordinary rate of speed? A. Yes; it seemed so. Q. What was it, if anything, attracted your attention and made you think the car was going unusually fast? Was there something you can tell us? A. No; I don't know of anything, except that it was going very rapidly,—unusually fast. Q. What called your attention to the accident, if anything? A. The car jarring; jarring of the car; seemed to jar as it struck. Q. Just describe what you saw and felt. A. The motorman was turning the handle so rapidly seemed to jar the whole car; you could feel it jar." Another passenger witness says no bell was rung; that the speed was pretty fair, but not very fast; that it was down hill; that he was about one hundred and fifty feet away when he saw the buggy; that the car ran at the same speed until between forty and fifty feet of the buggy. No attempt was made before that to stop the car or slacken its speed. When forty or fifty feet from the buggy, power was thrown off and brake put on at the same time. A quick stop after the motorman started to stop. He did not attempt to do anything with any cranks, the current, or the brake until he did the whole thing and stopped it immediately. The truck was pretty close to the car track,—about five feet from it. One witness, not a passenger, says the car came up to where the accident occurred "pretty fast." Another witness, who had experience in operating street cars, not a passenger, who observed the car at Brown street, which is west of Division street, from seven to eight hundred feet east of where the accident occurred, says that at about that point the car was running from fifteen to sixteen miles an hour. There was also testimony on the respondent's part tending to show that, in case of an emergency, the car could be stopped with the brake, if running

at the rate of ten miles per hour, in from forty to fifty feet; that if running at fifteen miles per hour it could be stopped in an emergency, by using the reverse current and the brake, in from twenty to twenty-five feet. There was testimony that if going eight miles an hour it could be stopped, in an emergency, in from thirty to forty feet.

For the appellant the motorman in charge at the time of the accident testified, in substance, that the accident occurred one hundred and twelve or fifteen feet west of Bernard street; the rate of speed was four or five miles an hour; that he saw the team in front of respondent's buggy; that it was a wood wagon with rack; that he did not know whether it was loaded; that it was the first team ahead that he saw; that he rang his gong for it; that respondent was not over thirty or forty feet from the car when he first turned on the track; that the wood wagon team was just opposite the front of the car when he turned on the track; that witness turned on the emergency brake and used everything that he knew of to stop the car; that when he first saw the two teams together they were from seventy-five to one hundred feet from him, the buggy following the wood wagon and close behind it; that the buggy was just crossing the fender when the car came to a standstill; the hind wheel of the buggy caught in the fender; the front wheel ran across the fender; after the hind wheel caught, the horse kept on going; the cross piece, that the singletree was attached to, broke; the respondent was dragged out by the lines; that if he had been dragged straight out over the dashboard he would have probably hit the car; that he did not go straight over the dashboard but fell over the outside corner of the dashboard and wheel of his buggy. A Mr. Hall, who was standing in the doorway of a barn on the north side of Front avenue, thirty or forty feet west of where the accident occurred, testified: "As I was stand-

ing in the doorway, I was looking out of the door and seen a wagon, . . . not right opposite the door, but quartering toward it from the door; and this Mr. Traver, he was behind the rig in a buggy, but I don't remember how far he was behind that rig, . . . or whether he was on the north of the street-car track, or whether he was astraddle of the rail,—that is, the buggy was astraddle of the rail; and just as the car—*then I noticed that the car was at the crossing on Bernard street*, and it seemed like Mr. Traver started to go across the track ahead of the car, and he could not make it in that way, so he turned the horse right around,—turned the horse to the side of the car,—and the wheel—the hind wheel—then slid up next to the car, and there is where the collision took place.” He says Mr. Traver fell out of the buggy about the time the fender caught the wheel, that the horse was pulling away from the car, and the car was pulling, and the horse broke loose. This witness, on cross-examination, seems to say that it was from twenty-five to thirty *paces* from where the respondent went on the track to where the car was. He testifies that there was room on the street for the buggy to have passed to the left of the wagon. “Question: The second time Mr. Traver was there to see you, didn't you tell him it was one hundred and twenty-five feet—one hundred and twenty-five feet from where the car was when you first observed it to the point where he went on the track? Answer: Well, of course, we stepped it, but for me saying just how far— Q. You can't remember that? A. Never paid enough attention to it. I was busy all the time.” A Mr. Kenwood, who was standing near Mr. Hall, says that when he first saw the respondent he was trying to get out of the way of the car, and that his horse's head was pointed east, and that when he first saw him the car was fifty feet or a little more from him. Mr. Walton says he

was sitting in front on the car; heard the gong ring; knew there was something up; looked out in front; saw a team coming against the car; it turned out; just as it turned out, respondent appeared from behind it with a one horse rig. The time was so short the car and respondent had a collision. He aimed to turn out, but did not get out in time, and the car struck the wheel of the buggy. It ran up on the fender and threw Mr. Traver out. The motorman stopped the car pretty suddenly,—about as quick as he ever saw a car stop. His attention was first attracted by the ringing of the gong. It was not long after the gong rang they got together, one going one way and the other meeting. “Question: Did you see Mr. Traver at the time the bell was rung or gong rung? Answer: No, sir. Q. You didn’t see what the trouble was? A. There was a team in front of him that they were ringing for, as I supposed. I didn’t see Mr. Traver until that team turned out.” He thought a part of the wagon the gong rang for was on the track. Mr. Bradley, another passenger on the car, says respondent pulled out from behind a large rig he appeared to be following. “He pulled on the track, and it was then he appeared to come in within range or sight of the car, and he then endeavored, as I could see at that time, to try to clear the track.” The motorman was doing his best to stop the car. Did not observe the motorman until the collision was imminent. Mr. Lee, a passenger on the car, testifies: “We were coming along about Bernard street. There was a heavy wagon and the respondent right behind. The heavy wagon was close to the track. When we got close to it respondent started out to cross the track with his buggy, and the motorman started to turn the brake and stop the car. The respondent started to turn around and come back to the same side of the track. The motorman rang the bell. Immediately on appearance of respondent

the motorman started to stop the car. The motorman was ringing the bell trying to make the wagon pull out before respondent drove on the track, and the car was not over ten yards from the wagon when the bell began to ring." Another passenger witness says that the first thing she saw was a large truck or dray wagon, and just before the car got up to that there was a team right behind it, and it turned out on the car track, and before the motorman could stop he struck the team; that the car was not going rapidly; that the gong was rung; that in stopping the car the passengers were jolted pretty badly. Mr. Notbohm, the superintendent of the road, testified that the fenders of the car extended over the rail about twelve or thirteen inches; the car was thirty-one feet long, exclusive of fenders, and weighed twenty-two thousand pounds. In rebuttal, respondent testified that the first time he talked to Mr. Hall, a witness for appellant, Mr. Hall said he could designate just the points where the respondent drove on the track and where the car was at that moment, and he did so, and that the witness paced it, and called Hall's attention to it, and it was, as near as he could make it, one hundred and forty feet; that he saw Hall a second time, and Hall indicated the points where witness went on the track, and where the car was at that time, and that the second pacing made it one hundred and forty-five feet; that he saw Hall a third time, with his attorney, and that time the distance was brought down to one hundred feet; that Hall told him that he saw the car and his entrance on the track simultaneously; that the car was then near the center of Bernard street.

We have abstracted the testimony at great length, because the appellant asked the court to instruct the jury that their verdict must be for the defendant. The principal contention of the appellant is that the doctrine to

“look and listen, and stop if necessary,” is applicable to electric street railways, and that the case, on the evidence, should have been taken from the jury, and decided by the court in favor of the appellant as a matter of law. This court, in a recent case against this appellant, held:

“It is not negligence *per se* if it is not shown that one looked and listened in crossing a street railway. The degree of care required in crossing a highway and steam railway, in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway on a public street. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not exclusive right of way, is not negligence as a matter of law.” *Roberts v. Spokane Ry. Co.*, 23 Wash. 325 (63 Pac. 506).

The car track is as much the street as any other portion of the traveled way. Of course, one must use his senses when driving on the streets, and in so doing he must do that which reasonable and ordinary care requires, and ordinarily it is a question for the jury to determine whether he has so acted. If respondent had looked in the particular instance under investigation, we are not prepared to say it would have been negligence to have driven on or across the track, if the car was as far away as he says it was when he first saw it, for he had a right to presume that those in charge of the car would observe his movements, and would not run him down. The obligations of the operator of the car and his obligations were mutual. Each was obligated to look out for the other, and govern his movements accordingly, just the same as if the vehicles they were driving were ordinary hacks or teams, with this qualification: That cars cannot turn from their course; they run on fixed tracks, and cannot accommodate themselves as readily to emergencies and cannot stop with the same promptness or facility, as drivers of free vehicles, and

drivers of such vehicles must yield the right of way with reasonable promptness to the passing cars. The supreme court of Minnesota has well stated the proposition thus:

“The evidence shows that if, after he got beyond the obstruction of the building on the corner, he had looked northward as well as southward, he could have seen the approaching car in time to have stopped his team before getting in dangerous proximity to the car track, and his failure to do so is claimed to be negligence *per se*, under the rule, so often applied by this and other courts, that it is the duty of a traveler on approaching a railroad crossing to look both ways for approaching trains before attempting to cross the railroad track. The fallacy in this, which runs all through counsel’s argument, is in assuming that the degree of care required at the crossing of a highway and an ordinary steam railroad is the test of the care required in crossing the track of a street railroad on a public street. The two cases are not alike. In the first place, street cars do not, or at least ought not to, run at the same rate of speed, are not attended with the same danger, and are not so difficult to stop quickly, as those of an ordinary railroad. In the next place, the cars of a street railway have not the same right to the use of the track over which they travel. The ordinary railroad is itself a highway, and has a proprietary interest in and to its right of way, even where the public have an easement for highway purposes over the same ground. Public necessity requires that the rights of a traveler on a highway across an ordinary railroad should be, to a certain extent subordinate to those of the railroad company. But a street railway is not a highway. A street railway company has a mere right to use the street in common with the public generally. It is merely in aid of the identical use for which the street was created, and not a new and independent one, and it is on that very ground that a street railway company is not required to pay compensation to the owners of abutting property. Street cars are in the main governed by the same rules as other vehicles on the street, and their owners have only an equal right with the traveling public to use the

street,—they have no proprietary right to any part of the street. Of course, there are some modifications of this general rule growing out of the necessities of the situation. For example, as street cars run on a track, they cannot turn out to one side of it. Hence what is called ‘the law of the road’ does not apply to them. It would be inexpedient to attempt any complete enumeration of the modifications of or exceptions to the general rule of equality of rights between street cars and other vehicles used on a street. But it is certain that there is no modification or exception that relieves a street railway company from exercising, at least, as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars.” *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395 (52 N. W. 902); *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30 (42 N. E. 334).

The supreme court of Massachusetts says:

“The fact that the power used by the street railway company is electricity, instead of that of horses, has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway.” *Robbins v. Springfield St. Ry. Co.*, *supra*.

The great weight of authority is to the effect that, before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them. *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287 (57 Pac. 820); *McQuillan v. Seattle*, 10 Wash. 464 (38 Pac. 1119, 45 Am. St. Rep. 799).

Under the facts in evidence in this case, we do not think the court erred in refusing to give the peremptory instruction “to find for the defendant,” requested by the appellant.

The principal charge of the court was as follows:

“1. Negligence has been aptly defined to be the omis-

sion to do something which a reasonable man, guided by those considerations which ordinarily regulate and conduct—regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do, under the circumstances of a given case. Before you can find for the plaintiff, therefore, you must find the defendant to have been guilty of negligence as alleged in the complaint. Another principle of law proper to be mentioned in this connection is that, if the plaintiff was himself guilty of negligence which materially contributed to the injury complained of, he cannot recover.

“2. This last proposition, however, has its exceptions; and I instruct you in this connection that, if you believe plaintiff was negligent in going upon the defendant’s track at the time and place and manner indicated by the evidence, still, if you find that the accident might have been prevented by the use of ordinary care upon the part of defendant’s employees in charge of the car, after they discovered the plaintiff upon the track; and if you find that they did not exercise such care, but, knowing the plaintiff’s danger, if he was in danger, *wilfully* allowed said car to run unimpeded up to the time when a collision was inevitable, then your verdict should be for the plaintiff.

“3. It is conceded that Front street, where the accident occurred, is a public highway. That being true, the plaintiff had as much right to be upon and travel over the same and every portion thereof, as the street car company; their rights were equal and mutual in that respect, with this qualification, however, that when both desired to pass a given point at the same time it is the traveler’s duty to yield the right of way to the street car, as, in the very nature of the case, it is unable to pass over other portions of the highway,—as, in the nature of the case, he is able to pass over other portions of the highway and the street car is not. With this exception and qualification, their rights are equal; and in this connection it is proper to say that plaintiff was not bound to pass around the truck or wagon in front of him on the left rather than the right, over the street car track, provided a man of ordinary prudence, under the circumstances, as appeared to the plaintiff

at the time, might have pursued the course he did. It is to be remembered, also, that they were both under obligations to exercise those rights with reasonable care, so as to prevent accidents to themselves and the public generally.

“4. What is reasonable care in a given case is to be determined by the circumstances and facts of that particular case. Negligence, or, which is the same thing, the absence of reasonable care, as already stated, is the foundation of this action, and it is to be determined by what the jury find an ordinarily prudent and careful man would have done under the particular circumstances of this case. If, tried by this rule, you find the defendant was not guilty of the negligence which produced the injury complained of, your verdict should be for the defendant. On the other hand, if, tried by this rule, you find the defendant was negligent in the management of the car in question, and that such negligence produced the injury complained of, you should find for the plaintiff, unless you find that he was guilty of contributory negligence, as heretofore defined.

“5. If you find that the car which struck the plaintiff's buggy at the time of or just previous to the collision was being run at a greater rate of speed than eight miles an hour, which is the limit under the ordinance of the city of Spokane, you would be justified in finding the defendant guilty of negligence in running the car at such rate of speed; and, if you further find that such negligence caused the injury complained of, you should find for the plaintiff, unless he was guilty of contributory negligence.

“6. If you should believe that the plaintiff might have avoided the accident by driving directly across the track instead of undertaking to turn, he would not necessarily be guilty of contributory negligence in that respect, provided you find that an ordinarily careful and prudent man, under the excitement and particular circumstances surrounding the plaintiff at the time, might have adopted the course pursued by him. His conduct in that regard is not necessarily to be judged by the facts as they now appear before the jury, as the same are subjected to the cool, calm consideration that you will be able to give them in the light

of all the facts and circumstances as they are now made to appear, but he is entitled to have them considered as they appeared to him at the time; and, as I said, if an ordinarily careful and prudent man might have acted as the plaintiff acted, with his view of the circumstances, as they then appeared to him, you will be justified in finding that he was not guilty of contributory negligence by turning back rather than by going directly across the track.

“7. The defendant is only required to use ordinary care in the operation of its cars, and the plaintiff is required to use the same degree of care,—that is, ordinary care,—in the use of the streets, and in crossing or going upon the track of the defendant. By ordinary care is meant such care as an ordinarily prudent person would use, under the particular circumstances involved.

“8. If the collision between the plaintiff and the car of the defendant was unavoidable, then your verdict must be for the defendant.

“9. You are instructed that, if you shall find that the defendant was operating its car at a high rate of speed, yet if you shall further find that the plaintiff, Traver, by his negligence and want of ordinary care, contributed to the accident in any appreciable degree, your finding must be for the defendant.

“10. You are instructed that if you find from the evidence, that the car was running at a moderate or ordinary rate of speed, and that the bell or gong had been sounded, and that the plaintiff suddenly and without warning, and under circumstances which were not reasonably to be expected, drove upon or attempted to cross the track of the defendant in close proximity to the car of the defendant, and at a time when it was not prudent to do so, then and in that event the plaintiff would not be exercising ordinary care or prudence.

“11. You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant, then and in that event it was negligence upon the part of the plaintiff to drive upon or attempt to cross the track of the defendant,

if the car of the defendant was in close and dangerous distance of the plaintiff.

"12. You are instructed that if plaintiff, Traver, was guilty of any act of negligence which directly contributed to his injury, or was guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done, under the circumstances, and such lack of care, act, or omission contributed to the accident, and without which the accident would not have occurred, then you cannot go further and apportion the accident or injury, but the plaintiff's contributory negligence in such case defeats recovery, and your verdict must be for the defendant. I charge that, and in such case, your verdict must be for the defendant.

"13. You are further instructed that, notwithstanding you should find that the defendant was guilty of negligence in the operation of its car, yet, if you further find, that the accident or the injury to the plaintiff would not have happened except for the negligence or failure to use ordinary care upon the part of the plaintiff, then your verdict must be for the defendant.

"14. You are further instructed that the defendant company, at the place where the accident happened and the collision occurred, had the preference and superior right to the use of the track, and that it was the duty of the plaintiff not to obstruct the use of said track or the operation of the cars thereon, and it was his duty to turn out to allow such street car to pass, if he was driving upon the track, and it was his duty to remain off the track and not attempt to cross the same in front of a moving car, except at a safe distance therefrom, and a failure in either of these respects constitutes contributory negligence and defeats recovery, and entitles defendant to a verdict.

"15. You are further instructed, that it was the duty of the plaintiff, Traver, to use his senses—his eyes and ears,—to discover the proximity and passage of the car of the defendant, and his failure to do so would constitute contributory negligence, and prevent any recovery by him.

"16. Ordinary prudence and common sense suggests to every one who is aware of the character and operation of

electric street cars that it is dangerous to pass in front of them at a short distance while in motion, and one who does so without looking and listening, when, if he had looked and listened, he could have discovered the car, is guilty of contributory negligence and cannot recover; and if you find if Mr. Traver had looked and listened he could have discovered the car, and thus have avoided the accident and injury, and that he failed to do so, your verdict must be for the defendant.

“17. If you find from the evidence that plaintiff, Traver, could, by the exercise of ordinary care, after he saw the street car, have avoided the injury to him by getting off the track before the car and his buggy collided, then, and in that event, your verdict must be for the defendant.

“18. You are instructed that if plaintiff, Traver, was not in imminent peril at the time he drove upon the track or attempted to cross the track of the defendant, the motorman had a right to presume that he would pass on over and off of the track, out of the way, and the motorman was not guilty of negligence in failing to stop the car, in either of the events just mentioned, until the peril of the plaintiff became imminent.

“19. You are further instructed that, if a person be seen upon the track of defendant's electric street railway who is apparently capable of taking care of himself, the motorman may assume that such person will leave the track before the car reaches him, and this presumption may be indulged in so long as the danger of injuring him does not become imminent, and it is not necessary for a motorman to slacken the speed of the car until such danger does become imminent.

“20. You are further instructed that if the plaintiff, Traver, thought he had time to cross the track of the defendant, if he was attempting to cross the track, before the car of the defendant would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff, and he cannot recover, and your verdict should be for the defendant.”

These instructions, taken as a whole, fairly presented to the jury the law applicable to the issues joined. We might

rest with this statement, but specific exceptions to certain of the instructions given, as well as certain other instructions requested by appellant and refused, were taken, and it is but just to appellant that we briefly examine them. The general allegation of negligence is found in the third paragraph of the complaint, and is to the effect that, through the negligence of the defendant in "running and managing" the car, the injury was inflicted. Under this allegation, it would have been competent for the plaintiff to have shown the rate of speed at which the car was running; that such speed was greater than allowed by the city ordinance; and that, in the management of the car, the warning bell was not rung. The allegations in paragraph five are to the effect that the speed was a higher rate than eight miles an hour, and no bell was rung or other warning given by defendant of the approach of the car; and in paragraph six the speed at which, by ordinance of the city, a car was allowed to run is alleged. In some jurisdictions it is held that, when there is a general allegation of negligence followed by an enumeration and averment of specific acts, the plaintiff is confined to the acts so specified. Unless the complaint clearly indicates that it was the intention of the pleader to limit the negligence to the specific acts, we do not think that, under our liberal system of pleading, such a rule should prevail in our courts. The facts pleaded in paragraphs five and six of the complaint were merely evidentiary matter. The complaint does not allege facts upon which to charge wilful negligence, and it may be conceded that the use of the term "wilfully" in the second instruction of the court was not warranted by the allegations or proof. We are at a loss to understand, however, how the error complained of was prejudicial to the appellant. There was no evidence in the case from which a wilful injury could be inferred. The allegations of the complaint

were broad enough to admit proof of gross negligence. There was evidence from which gross negligence might be inferred. There was no instruction given on the question of gross negligence. This instruction was evidently intended to cover gross negligence. It requires stronger and more convincing proof to establish wilful negligence than gross negligence. If it appear that the jury are misled by the instruction to the injury of the party complaining, the judgment will be reversed. On the other hand, where it is apparent that the instruction could not have been prejudicial, the giving of such an instruction, though error, will not operate to reverse. This is especially true where the instruction is favorable to the party complaining. *People v. Riley*, 65 Cal. 107 (3 Pac. 413); *Berry v. Missouri Pacific Ry. Co.*, 124 Mo. 223 (25 S. W. 229); *People v. Cochran*, 61 Cal. 548.

The objection urged to instruction three, given by the court, is that it fails to instruct the jury that the rights of the street railway were *paramount and superior* to the rights of those traveling upon the streets. What we have said as to the peremptory instruction requested by appellant applies to this instruction. We think the court, in instruction three, and instruction eleven, which must be read in connection with it, correctly stated the law. Whether the respondent should have driven upon the track at the time he did, or should have passed to the right or the left of the vehicle in front of him, were questions, under the circumstances of this case, for the jury. Clearly it was not for the trial court to say that the respondent was chargeable with such negligence in the use of the street, which he had a lawful right to use, as contributed to the accident. As was said by the supreme court of New Jersey:

“Before the trial judge could so determine, the proof must have been so convincing to him that he could extract

from it no other reasonable inference or conclusion. If the facts were such as that these questions remained in substantial dispute, then they must be submitted to the jury. If, from the facts in evidence, two inferences or conclusions can be reasonably deduced, one favorable to the plaintiff and the other against him, a question then is presented which conclusively calls for the opinion of the jury. This principle is alike applicable to the question of whether negligence, as the proximate and sole cause of the injury, has been established against the defendant or not." *Consolidated Traction Co. v. Reeves*, 58 N. J. Law, 573 (34 Atl. 128); *Murphy v. Nassau Electric Ry. Co.*, 46 N. Y. Supp. 283.

The fact deducible from the testimony of the respondent is that there was no danger when the respondent turned on to the track, and that he did not go into a position of danger, because the car was at such a distance from him as to make it safe for him, without unreasonably obstructing the car track, to pass the team in front of him. We do not think the instruction was such a comment upon the evidence, if a comment at all, as to be prejudicial to appellant. The appellant cannot object to that portion which says that the plaintiff was not bound to pass around the truck in front of him on the left, rather than the right, over the street car track, provided a man of ordinary prudence, under the circumstances as they appeared to plaintiff at the time, might have pursued the course he did, because the court assumes that there was room to pass around the truck on the left, and if this was prejudicial it was to the respondent rather than to the appellant. The other criticism of this instruction by appellant is based on the assumption that the respondent got into the position he was by reason of his own negligence. We have said that this was a question, not for the court to assume, but for the jury to determine.

As to instruction six, the following is from the appellant's brief:

"It is a comment upon the evidence in calling the attention of the jury to the fact that if he did, or failed to do, a particular thing, he was not guilty of contributory negligence, although he might have done something else and avoided the accident. It was a comment upon the evidence to tell the jury that he was not guilty of contributory negligence in failing to drive directly across the track, instead of undertaking to turn and drive along the track, provided an ordinarily careful and prudent person, under the excitement and particular circumstances surrounding the plaintiff at the time, might have adopted the course pursued by him. The instruction is erroneous in telling the jury that he was not guilty of contributory negligence if an ordinarily prudent man *might* have adopted the course pursued by him. The use of the word '*might*' is clearly misleading and not warranted by the law. It is purely speculative to say what *might*, or *might not*, have been done. The rule of law requires a person to act as an ordinarily prudent person *would* have acted, not in such manner as some ordinarily prudent person *might* have acted. The instruction was not applicable to the facts of this case, and the respondent was not entitled to have the same given. A person cannot invoke the rule attempted to be announced in that instruction, when the sudden danger is occasioned in whole or part by his own fault or negligence, as in the case at bar. Shearman & Redfield on Negligence, paragraph 89, in discussing the rule of mistaken judgment under sudden alarm, closes the section with the following sentence: 'No such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment.' "

We do not think this is a comment upon the evidence, within the constitutional inhibition. It simply states what might be done under a certain state of facts, but leaves the jury entirely free to determine the facts. The comments on the terms "might" and "would," it seems to us, are over critical. As we have said, it was for the jury to say,

and not for the court to assume, that the danger was occasioned by the fault and negligence of the respondent. That being the case, the instruction was proper if the jury came to the conclusion that it was not the plaintiff's own fault that brought him into the peril, disturbing his judgment.

The appellant objects to that portion of instruction four which says:

"If, tried by this rule, you find the defendant was not guilty of the negligence which *produced* the injury complained of, your verdict should be for the defendant."

It is true that the question to be determined is not whether the plaintiff's negligence *produced*, but whether it *contributed to*, the injury complained of. But this instruction must be read in connection with instructions No. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 20, and when so read we can safely say the jury were not misled.

Instruction five, even if erroneous, was not misleading when taken in connection with instructions thirteen and seventeen.

The eighth instruction requested by appellant was properly refused. It was to the effect that it was the duty of a person, before going upon or across the track of an electric street railway company, to look and listen, and, if necessary, to stop; that if the plaintiff failed so to do, and drove upon or attempted to cross the track of the defendant, he is presumptively guilty of negligence, and the burden of proof is then upon him to show that he was free from fault in any respect whatever. What we have said as to the refusal of the court to give the peremptory instruction requested by the appellant, and as to instruction three given by the court, applies to this assignment of error. As to looking and listening, instructions fifteen and sixteen together, as given by the court, correctly stated the law, as we view it, relative to electric street railways.

The appellant is incorrect in stating that the testimony shows that the respondent was pitched forward over the dashboard, *and toward the car*. The motorman, on cross-examination, testified:

“Question: Did you see whether the plaintiff went over the dashboard or at the side of his buggy? Answer: Well, now, if he went right straight over the dashboard, of course, he would have probably hit the car, and he didn’t go right straight over the dashboard, and a dashboard of a buggy is pretty narrow. Now, he probably fell, kind of went over where the outside corner of the dashboard and the wheel of his buggy— Q. On which side of his buggy? A. On the opposite side of the car.”

This testimony tends to show that he was tipped out; at least, all this was a question for the jury, and the instruction requested by appellant to the effect, “If you find from the evidence that the plaintiff, M. E. Traver, was not thrown out of his buggy by the collision with the car, but was dragged out by holding onto the lines, when if he had not so held onto them he would not have been dragged out, then your verdict must be for the defendant,” was properly refused by the court. Besides, there was testimony tending to show that the wheel of the buggy caught in the fender of the car; that the car was pulling one way, and the horse the other, and the cross tree broke, and that this was the reason the plaintiff was pulled out of the buggy. The question as to what was the proximate cause of the injury, and as to what would have been the result if the respondent had not held on to the lines, was for the jury alone.

The appellant requested the following instruction, which was refused:

“You are further instructed that the plaintiff, M. E. Traver, had no right to attempt to save property, if such attempt would endanger him or his person, under the cir-

cumstances detailed in evidence in this case, and it was his duty to use ordinary care in preserving himself and his person from danger or injury, notwithstanding property might be damaged or injured if he abandoned it."

The only evidence in the case upon which to base the instruction was the following, on the cross examination of the respondent:

"Question: No; you just stopped your horse, and waited until the other rig got out of your way? Answer: No; I didn't have occasion to do that; my horse he kept on moving, and I checked my horse sudden, and was scared to see the street car coming, and it was nearer back than across, and I thought that was the proper way to go. Q. You thought you could get off that way without any trouble? A. I thought I ought to. I didn't know I could the way the car was coming. Q. If the car was coming very rapidly, as you say it was, why didn't you jump out of the buggy? A. Because I wanted to save everything."

There is nothing to show that he would have been any safer in jumping out than in remaining in the buggy. The car was almost upon him and he was in the buggy on the track, and whether he could have cleared the track or cleared the car by jumping does not appear. It does appear, however, that he was an old man, and from that fact the jury might infer that he was unable to save himself by jumping from the buggy. There is testimony from which to conclude that he was in a position of danger by reason of the negligence of the appellant in running its car at a high rate of speed and failing to stop in time, and that he was greatly alarmed by the speed at which the car was running. Under such circumstances, he cannot be held for an error in judgment. If a person in a position of safety voluntarily goes into a position of danger for the purpose of saving property and is injured he cannot recover. That is not this case, however.

Did the court err in overruling defendant's objection to

the competency of the witnesses Long, Nelson, and Dragoo, who were called as experts to testify as to the distance in which a car, going at various rates of speed, could be stopped? The witness Long had previously handled electric motor cars. He had been to the car barn of the appellant company two or three times, and had observed the motors used by it. He had worked in car shops two years. He had had the whole thing explained to him and had worked on motors himself, adjusting them to cars, and had also operated electric motor cars. The witness Nelson had been a motorman in the service of the appellant company something over two years, and had worked on the road about eight months, both as motorman and conductor, and had worked on cars similar to the one in use at the time the injuries were inflicted on the respondent. He had worked for the company as late as 1897, and had even received instructions as to the operation of the motor in use at the time of the accident. The witness Dragoo worked for the company during the years 1892, 1893, and 1894, and had acted as both conductor and motorman during that time. It is clear from the examination of these three witnesses as to their competency to testify as experts, that they were men of considerable experience in this line of employment. It is safe to assume that they were the best experts obtainable by the plaintiff. It is true that motormen then in the employment of the defendant corporation were no doubt better acquainted with the equipment of this car and better qualified to testify than were the witnesses called. The respondent, however, should not be compelled to look to employees of appellant for expert witnesses. The reasons are obvious. The rule covering the admission of this class of testimony is well laid down in 12 Am. & Eng. Enc. Law (2d ed.), p. 427, where it says:

“On the whole, it can hardly be said that there is any

well defined standard by which to measure the qualifications of an expert, and it is largely in the discretion of the trial judge to determine them."

In the case of *Montana Ry. Co. v. Warren*, 137 U. S. 348 (11 Sup. Ct. 96), the supreme court of the United States, in commenting upon evidence of this character said:

"The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence."

In the present case, after the three experts had testified, the appellant introduced no evidence whatsoever as to the distance in which cars moving at various rates of speed could be stopped. It placed its superintendent, L. F. Notbohm, upon the stand, and questioned him at length as to the methods of stopping a car, but asked him no questions as to the distance in which it could be stopped while going at various rates of speed. With the ability to place upon the stand a number of motormen thoroughly competent to testify upon this question, it failed to avail itself of that opportunity. It is fair to assume that the testimony of the experts examined on behalf of the respondent was correct, and could not be successfully controverted. A court trying a cause must determine the competency of a witness to testify as an expert, but it is for the jury to determine the weight of such evidence. *Forgey v. First Nat. Bank of Cambridge City*, 66 Ind. 123.

The best statement of the rule governing the admission of this class of evidence is the one of Mr. Justice CLIFFORD, of the supreme court of the United States, in the case of *Spring Co. v. Edgar*, 99 U. S. 658, where he says:

"Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court; and the rule is, that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous. *D. & C. Steam Towboat Co. v. Starrs*, 69 Pa. St. 36; *Page v. Parker*, 40 N. H. 48; *Tucker v. Massachusetts Central Railroad*, 118 Mass. 546."

Tested by this rule, nothing short of a clear abuse of discretion will justify an appellate court in reversing the judgment of the trial court for its refusal to exclude expert testimony. Clearly, there is not only no abuse of discretion on the part of the trial judge in this case, but the witnesses were shown to be qualified to testify. The evidence was conflicting, but every rule of law pertinent to the liability of the appellant, or to the relative duties of the parties under the circumstances deducible from the evidence, was laid before the jury. The jury by its verdict has found that the respondent did not contribute to the injury; that the appellant was negligent as charged. The judgment of the court below is therefore affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 3524. Decided May 27, 1901.]

CORA E. NIXON, *Respondent*, v. TRAVELLERS' INSURANCE COMPANY, of *Hartford, Connecticut*, *Appellant*.

INSURANCE — CONDITIONS OF POLICY — PAYMENT OF PREMIUMS —
WAIVER BY AGENT.

A policy of insurance upon the life of plaintiff's husband was issued by defendant; the premiums thereon were payable to the general agents of the defendant located in the city of

May 1901.] Opinion of the Court.—FULLERTON, J.

the insured's residence, upon receipts countersigned by them, which had printed thereon in bold-faced type the words, "The agent has no authority to waive or postpone payments of premiums, or to countersign any receipt, unless the premium is actually paid in cash." Upon several occasions the agents, without knowledge of their principal, had accepted the insured's checks and deferred presenting them for a short period, at his request, but upon one occasion, when the premium was not paid when due, they had required him to make application directly to the company for reinstatement. Held, that the agreement of the agents to extend the time of payment of a premium due was not binding upon the defendant.

SAME — FORFEITURE.

The fact that a policy of insurance contained no provision for forfeiture for non-payment of any installment of premium, but only such a provision for forfeiture upon non-payment of the full annual premium, was immaterial, where the policy gave the insured the option to pay premiums either annually or in quarterly installments, and the insured chose the latter method, thus making it a part of his contract.

Appeal from Superior Court, Pierce County.—Hon. JAMES A. WILLIAMSON, Judge. Reversed.

Frank P. Lewis, for appellant.

Stanton Warburton, Bates & Murray, and Sullivan & Christian, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an action upon a policy of insurance issued upon the life of Thomas L. Nixon. The testimony most favorable to the contention of the respondent was substantially as follows: In December, 1887, Nixon, the husband of the respondent, made application to the appellant, through its agent, one Walter J. Ball, for a straight life policy. The application was upon a printed form used by the company, and contained, after the usual numerous questions, a certificate, signed by the applicant, reciting that the application should be made a part of the insurance contract applied for, and "that no agent of the

company shall have any power to waive or modify any of the conditions of the insurance contract." On January 3, 1888, a policy was issued to the applicant for the sum of five thousand dollars payable to the respondent. The policy, as issued, in terms made the application a part of the contract, and called for an annual premium payable on or before the 3d day of January of each year, but provided that the assured might, with the consent of the company, pay the premium in quarterly installments. The policy contained, among others, the following clause:

"All premiums are payable at the Home Office in Hartford, Conn., but will be accepted if paid to an agent in exchange for a receipt signed by its president or secretary, and countersigned by the agent designated thereon. This policy shall not take effect unless the first premium is paid while the *insured* is in good health; and if the second or third annual premium be not fully paid when due, this policy and all claims under it shall be void and the premiums already paid shall be forfeited to this company."

The assured elected to pay the premiums quarterly, and did pay them down to and including the quarterly payment falling due April 3, 1890. The assured resided from the time of the date of the policy until his death at Tacoma, Washington. This place was also the place of residence of Delprat & Ball, a partnership composed of George R. Delprat and the Walter J. Ball above named. The members of the firm were the resident agents of the company at Tacoma, and its sole representatives at that place. They had power and authority to solicit insurance for the company, collect premiums upon policies issued, and countersign receipts for premiums collected. Their signature was necessary, according to the recitals on the face of the receipts issued to the assured for the payment of premiums, to the validity of such receipts; and it was shown that the agents had on one or two occasions taken the assured's

May 1901.] Opinion of the Court.—FULLERTON, J.

check on a local bank in payment of a premium due, and at his request deferred presenting it for payment for a short period of time. But it was shown that, on a previous occasion, when the premium was not paid when due, they had required him to make application directly to the company for reinstatement. It was also shown that each receipt issued had printed upon it in bold-faced type the clause, "The agent has no authority to waive or postpone payments of premiums, or to countersign any receipt, unless the premium is actually paid in cash." Prior to the time the premium of July 3, 1890, became due, the assured left his home, leaving his business in charge of his brother-in-law, one George G. Matthews. At or just before the payment fell due, Ball called upon Matthews, and inquired when the assured would return, calling his attention to the fact that the premiums upon the policy sued upon and certain other policies were about to become due. Matthews told him that he expected the assured to return almost any day, but that, if it was necessary, in order to prevent the policies from lapsing, to pay the premiums, he would pay them himself, without waiting the assured's return. To this Ball answered that it was not necessary for him to do so; that the assured was a good friend of his, and that he would not allow the policies to lapse, but would protect them. Shortly thereafter a subsequent conversation was had between them practically to the same effect. About two weeks after this, Matthews met Ball upon the street, and handed him a telegram received from the assured, wherein it was stated that the assured would return the next day. At that time Ball stated that the "policies were all right, and that he would arrange with Mr. Nixon on his return." On the return of the assured he applied to Ball to pay the premium, and was informed that it would be necessary for him to get a health certifi-

cate, and apply directly to the company for reinstatement. It appears that the assured was in a bad state of health at the time, that his health did not subsequently improve, and that he died in the following April. Due proof of his death was made to the company, and payment of the insurance demanded. The company refused to pay, on the ground that the policy had lapsed because of the failure to pay the quarterly premium falling due on July 3d. The appellant, at the conclusion of the respondent's case, moved for a nonsuit, on the ground, among others, that the evidence was insufficient to make a *prima facie* case for the jury. The motion was overruled, and the case submitted to the jury, which returned a verdict for the respondent. From the judgment entered thereon this appeal is taken.

The motion for nonsuit should have been granted. The rule is fundamental that a principal is bound by the acts of his agent only when the agent acts within the scope of the authority conferred upon him, or where he acts within the apparent scope of his authority and the person dealing with him as such has no knowledge that his authority is less than his principal has made it appear to be. Here it cannot be disputed that the assured had knowledge of the want of authority on the part of the agents with whom he was dealing to extend the time of the payment of the premiums. Not only was it stated in his contract that they had no such power, but the successive receipts issued to him expressly warned him that no agent had authority to waive or postpone such payments. More than this, these very agents, when the assured had lapsed in a former payment, expressly refused to assume the exercise of the power to waive a forfeiture of the contract, but required him to apply to the company direct for reinstatement. Unless it is to be held that the company can-

May, 1901.] Opinion of the Court.—FULLERTON, J.

not appoint an agent for the transaction of a particular part of its business without conferring upon the agent all the powers possessed by the corporation with relation thereto, it cannot be held that these agents had power to waive the express stipulation in this contract to the effect that failure to pay a premium when due rendered the contract void. The authorities cited by the respondent do not go to this extent. The waivers there held sufficient to keep the contract alive were either made by the corporation itself,—that is, by the board or person empowered by the corporate charter to exercise the functions of the corporation,—or by a duly authorized agent acting within the apparent scope of his power, and the person dealing with him had no knowledge of any limitation imposed thereon. To the latter class belong the decisions cited from this court. *Henschel v. Oregon Fire, etc., Ins. Co.*, 4 Wash. 476 (30 Pac. 735); *Cole v. Union Central Life Ins. Co.*, 22 Wash. 26, 31 (60 Pac. 68, 47 L. R. A. 201); *Hall v. Union Central Life Ins. Co.*, 23 Wash. 610 (63 Pac. 505, 51 L. R. A. 288).

The second objection, viz., that there is no provision in the contract declaring a forfeiture for the nonpayment of an installment of a premium, is equally without merit. The assured was given his option either to pay the premiums annually or in quarterly installments. As he chose the latter method, he was bound by it until he gave notice that he desired to pay in the other manner. This method of payment was thus a part of his contract, and a failure to comply therewith constituted a breach.

The judgment is reversed, and the cause remanded with instructions to enter judgment for the appellant.

ANDERS, J., concurs.

DUNBAR, J., (concurring).—I concur in the result, for the reason that the record shows that the assured had

actual knowledge, outside of the stipulation in the policy, of the limitations of the agent, but not on the ground stated in the majority opinion. I make no question of the correctness of the rule stated in relation to the general law of agency, but do not think the strict rule ought to apply to insurance and other similar companies which do their business exclusively through agents. In such cases all the actors are necessarily agents. The company is composed of agents; and persons who contract with them will, in spite of all theories of law, rely upon the statements of such agents, and will regard them as the company. They will not scrutinize closely all the conditions contained in the body of the policy, and could not understand many of them if they did. They will rely upon the statements of the agents appointed by the company, and who come to deal with them armed with the recommendations of the company; and innocent parties, who act on their advice, ought not to suffer. In addition to this, the contracts are, in a sense, one-sided. They are prepared in advance by the agents of the company, without any consultation with or consideration by the assured, and they place the parties in a different position, so far as responsibility is concerned, from the ordinary mutual contract or agreement made and entered into between individuals. Such is the modern doctrine of the courts, and such is the doctrine of this court as announced in *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620 (38 Pac. 213, 27 L. R. A. 86), and cases cited therein.

REAVIS, C. J.—I concur for the reasons stated by Judge DUNBAR.

May, 1901.] Opinion of the Court—FULLERTON, J.

[No. 3622. Decided May 31, 1901.]

HERMAN BARTELT, *Appellant*, v. CHARLES SEEHORN,
Respondent.

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APPEAL — RECORD — PLEADINGS IN FORMER ACTION — JUDICIAL NOTICE.

Where judgment on the pleadings has been rendered upon an answer of former adjudication, which was not traversed, the plaintiff cannot, on appeal, have the pleadings in the former case certified by the clerk to the supreme court, for consideration by that court in passing upon the contention that the causes of action were different, when such pleadings had not been put in evidence in the trial court.

JUDGMENTS — RES JUDICATA — WHEN DISMISSAL OPERATES AS BAR.

A judgment dismissing an action for damages after the introduction of plaintiff's testimony, based on the ground of plaintiff's contributory negligence, is a judgment on the merits and not one for failure of proof, and stands as a bar to any subsequent action between the same parties for the same cause of action.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

Samuel R. Stern, for appellant.

Armour & Shine, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The appellant brought this action to recover damages for the loss of a horse, alleged to have been caused by the negligence of the respondent. The respondent answered the complaint by a general denial, and by pleading affirmatively three separate defenses, one of which was as follows:

"1. That on the 30th day of November, 1898, at Spokane, in an action then pending in the above-entitled court between the above-named plaintiff and the above-named defendant, and for the same cause of action as that set forth in the complaint herein, the court, after the case

coming on for trial and hearing the testimony of plaintiff, and it appearing from the testimony of said plaintiff that he had knowledge of the defective condition of said fence described in the complaint, ordered the action dismissed, and a judgment was duly made and given as follows:

HERMAN BARTELT, *Plaintiff*,

v.

No. 13017.

CHARLES SEEHORN, *Defendant*.

On the 30th day of November, 1898, this cause came regularly on for trial, and the jury being regularly impaneled, and it appearing from testimony of plaintiff's witnesses and the pleadings that the plaintiff was not entitled to any damages herein, and the court being fully advised in the premises, it is by the court ordered that said action be dismissed, and it is ordered that defendant recover his costs and disbursements herein.

LEANDER H. PRATHER, Judge.'

"And the cost bill was filed, and the judgment was thereafter satisfied by defendant paying the plaintiff the amount of said costs."

The appellant, in his reply, did not traverse the allegations contained in the separate defense quoted, whereupon the respondent moved for judgment on the pleadings, which motion the trial court granted, and entered judgment for the respondent. This appeal is from that judgment.

The appellant contends that the prior action between the parties was prosecuted upon a different theory from the one before us, and upon different allegations with respect to the facts; that it required entirely different proof to maintain it from that required to maintain the present action, and hence the judgment entered in the first action, conceding it to be upon the merits, is not a bar to the second. To support his contention, he has caused the clerk of the trial court to certify the pleadings in the former case to this court, and insists that they are properly before us for consideration. It is manifest, however, that the

May, 1901.] Opinion of the Court.—FULLERTON, J.

plea alone is before this court. The only question the trial court passed upon in determining the motion of the respondent, was whether the facts alleged in the plea of former judgment constituted a bar to the appellant's cause of action. This it was required to determine from the face of the pleading. It could not notice judicially the pleadings or proofs submitted in any former action, even though such action was between the same parties and before the same court; and what the court of original jurisdiction cannot judicially notice, an appellate court on an appeal from its judgment cannot judicially notice. To have made the questions here contended for available to him in this court, the appellant should have taken issue upon the plea, introduced the pleadings as evidence at the trial, and brought them before this court by a statement of facts or bill of exceptions over the certificate of the trial judge.

The sole question before us therefore is, do the facts pleaded in the separate answer quoted show that the controversy was barred by the former judgment? It may be conceded, as the appellant argues, that a judgment of nonsuit or of dismissal entered by the trial court, on motion of the defendant, when the plaintiff fails to prove a sufficient cause for the jury, is not a bar to a subsequent action for the same cause. Such is the rule not only under the general principles of law, but by the express terms of the statute. Bal. Code, §§ 5085-5087. But the averment in the answer quoted is not that the plaintiff merely failed to prove a sufficient cause for the jury. It is averred that his evidence showed that he had knowledge "of the defective condition of said fence described in the complaint," which, as a matter of law, in the judgment of the trial court, precluded him from recovering damages for the injury complained of in his complaint. In other words,

the trial court found from the plaintiff's testimony that the damages suffered by him were occasioned by his own fault or negligence. A judgment entered by the court under these circumstances, whether of dismissal, or that plaintiff take nothing by his action, is not a judgment for failure of proof. It is a judgment on the merits of the controversy, and as such, so long as it stands not vacated or reversed, is a bar to any subsequent action between the parties for the same cause of action. We conclude, therefore, that the judgment appealed from is right and should stand affirmed.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

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[No. 3898. Decided June 1, 1901.]

THE STATE OF WASHINGTON *on the Relation of J. H. Smith, Respondent, v, GRANT NEAL, as Auditor of Skagit County, et al., Appellants.*

COUNTY OFFICERS — SALARIES — MEASUREMENT BY POPULATION —
FEDERAL CENSUS AS EVIDENCE.

Under art. 5, § 11, of the constitution, which requires the legislature, by general laws, to regulate the compensation of county officers, in proportion to their duties, and for that purpose to classify the counties by population; and under Laws 1889-90, p. 302, classifying counties, which puts those having between 14,000 and 16,000 population in the thirteenth class; and under Laws 1895, p. 409, which fixes the annual salary of county clerks in counties of the thirteenth class at \$1,500; it is the duty of the county commissioners, in the absence of any law pointing out how population should be ascertained, to determine the fact by proof, and for this purpose the most recent federal census is competent evidence; hence mandamus will lie to compel the proper officers to allow the claim of a county clerk for an increase in compensation, where the proof shows that, prior to his term of office, the federal census of 1900 showed that his county had been raised to a class entitling its officers, under

June, 1901.] Opinion of the Court.—WHITE, J.

the law, to a higher rate of compensation. (Fullerton and Mount, JJ., dissent).

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Affirmed.

M. P. Hurd, Prosecuting Attorney, for appellants.

Henry McBride, for respondent.

The opinion of the court was delivered by

WHITE, J.—This is a mandamus proceeding originally commenced in the superior court of Skagit county, by J. H. Smith, the duly elected, qualified, and acting county clerk of said county, against Grant Neal, the auditor of said county, and the board of county commissioners, to compel said board to allow a certain claim alleged to be due the relator for his salary as county clerk of said county, and said auditor to draw a warrant for the same. The claim is for salary from the 14th day of January, 1901, on the basis that the population of said county at the time of the presentation of the claim was 14,727, as shown by the federal census for 1900, and that the county is, therefore, in the thirteenth class under the provisions of the act of March 26, 1890 (Session Laws 1889-90, p. 302). The respondent had judgment in his favor in the court below.

The provisions of the constitution are mandatory. Art. 1, §29. The legislature shall fix the compensation by salaries of all county officers. The salary of any county officer so fixed shall not be increased or diminished *after his election*, or during his term of office. Constitution, art. 11, §8. The legislature, by general and uniform laws, shall provide for the election of county officers "as public convenience may require, and shall prescribe their duties and fix their terms of office. *It shall regulate the compen-*

sation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population." Constitution, art. 11, § 5. By general laws the legislature has provided for the election of county clerks, and has prescribed their duties. They are elected for the term of two years, in November of the even years, and their term of office commences on the second Monday in January following. The constitution declares that their compensation shall be regulated *in proportion to their duties*, and, to determine that proportion, the legislature may classify the counties by population. The first classification of counties by population was made by the legislature in the act of March 26, 1890 (Session Laws 1889-90, p. 302); and this act remained in force until the act of March 18, 1901 (Session Laws 1901, p. 289). By the first classification it is provided that counties with a population of fourteen thousand and under sixteen thousand shall be in the thirteenth class. The salary of the county clerk in counties of the thirteenth class was, under the law of 1895, \$1,500 (Session Laws 1895, p. 409). Under the law of March 26, 1890, in counties of the thirteenth class the county clerk was to receive an annual salary of \$1,800. This salary was reduced by the act of 1895. But, while the legislature amended the act in this particular, nothing was done as to the mode of ascertaining the population. By the amendment of the salary provisions of the act of March 26, 1890, in 1895, the legislature clearly indicated that it regarded the act of March 26, 1890, as a compliance with § 5, art. 11, of the constitution, relative to the classification of counties in order to fix the salaries of county officers. The first paragraph of § 1 of the act of March 26, 1890, reads as follows:

"For the purpose of regulating the compensation of county officers herein provided for, the several counties of

- this state are hereby classified according to their population as will be ascertained by the federal census of 1890, and thereafter every two years by the county or precinct assessor's enumeration of the census of the different counties of this state as follows, to-wit."

When this act was adopted, the law provided that the assessors should biennially take a census of the inhabitants of their respective counties. In 1893 the law requiring a biennial census was repealed. The first classification of counties was determined by the federal census of 1890. It is claimed that, because there is now no means provided for the biennial ascertainment of the population of the counties, such as existed when the act of March 26, 1890, was enacted, therefore the counties must remain in the same classes they were classified in, prior to the repeal of the act for biennial enumeration of the population by the assessor. The provision of the constitution is imperative that the compensation of officers shall be in proportion to their duties, and those duties shall be measured by the population they serve. The population of a county in a new state is not supposed to remain stationary. The legislature, by the act of 1895, has said that, where the population exceeds fourteen thousand and is under sixteen thousand, the county clerk shall be paid \$1,500 per annum. The mere fact that the legislature has failed to point out the means of ascertaining the population should not defeat the plain provisions of the law and the mandates of the constitution. Biennial selections of officers are provided for, and the constitution recognizes the fact that the salaries of officers may be increased or diminished; and the legislature, following out the commands of the constitution, has established a rule based on population by which salaries of officers are to be determined. Section 10, art. 4, of the constitution provides that in incorporated cities or towns having more than five thousand inhabitants

the justices of the peace shall receive such salary as may be provided by law. An act of the legislature passed in 1891 provided that justices of the peace in incorporated cities and towns of the third class having more than five thousand inhabitants, *as shown by the last state or federal census*, should receive an annual salary of \$1,200. New Whatcom was not an incorporated city at the time the federal census was taken. There was no provision of law for taking a state census of the city. This court said:

“It seems to us that under this constitutional provision it becomes a fixed fact that cities or towns having more than five thousand inhabitants are entitled to salaried justices of the peace; that that fact and the ascertainment of it is directed to the court and not to the legislature; that to the legislature was directed the fixing of the salary, and the legislature in this instance has fixed the salary under the power given to it by the constitution. . . . In this instance the enactment of the legislature might absolutely destroy the right conferred by the constitution. The legislature has not seen fit to provide for the state census, so that under the statute law as it exists the only means of ascertainment of the population of the city is the federal census, which is taken only every ten years. It might very reasonably occur that a city which did not have quite the requisite five thousand population at the time of the taking of the federal census in 1890 might within six months or a year have the requisite population, and yet this fact could not receive a judicial determination or announcement for the period of nine or ten years, so that, if the law should receive this construction, its effect would be to destroy or limit the right which the constitution gave. The test provided for by the legislature must be a reasonable one—one which would carry into effect the constitutional guarantee instead of destroying it. . . .

. In this case it is manifest that the provision can be determined by competent testimony outside of any legislative enactment, and that all the language of the constitution indicating that the object is referred to the legislature

for action is with reference to fixing the salary, and the fact that this particular portion alone of the subject is especially referred to the legislature excludes the idea that the ascertainment of the population was also referred to the legislature." *Anderson v. Whatcom County*, 15 Wash. 47 (45 Pac. 665, 33 L. R. A. 137).

Apply the reasoning in the case just cited to § 5, art. 11, of the constitution, and to the act of 1895 fixing the compensation according to a defined population, and we must come to the conclusion that the legislature has fixed the salary, but has left it to the court to ascertain the class in which the officer falls to whom the particular salary so fixed is payable. The presumption is that the legislature intended to carry into effect the provision of the constitution determining the compensation of officers in proportion to their duties, those duties being greater or less according to the population served; and that it did not intend to destroy or limit the right which the constitution gave by the repeal of the law for a biennial census. To give this repeal the effect contended for by the appellants would be to destroy a right conferred by the constitution, viz: the right to receive pay in proportion to the duties performed. The salary to be paid has been clearly and definitely fixed according to population. There is nothing in the provisions of § 5, art. 11, of the constitution, from which it can be inferred that the *means* of ascertaining the population for the classification was also referred to the legislature. It is just as manifest in this case as in *Anderson v. Whatcom County*, *supra*, that the population of a county can be determined by the courts by competent testimony outside of any legislative enactment as that the population of a city could be so determined. The board of county commissioners is charged by law with the financial management of the county affairs. The county officers must be paid in proportion to their duties as based on pop-

ulation. In the absence of any law pointing out how that population should be ascertained, the board of county commissioners can determine the fact by proof, just as it can determine any other fact necessary for the discharge of its duties. By the act of March 18, 1901, § 1 of the act of March 26, 1890, was amended in several particulars, and all reference as to how and by what means the population should be ascertained was omitted. This omission leaves this last act without force, unless the boards of county commissioners or the courts are authorized to ascertain the population. The enactment of the law of March 18, 1901, without reference to the mode of ascertaining the population of classified counties, strengthens the view we have adopted in this case that it was the intention of the legislature to leave that matter, as incident to its duties, with the board of county commissioners, and the courts in case the action of the board of county commissioners was questioned. We think that the court below was justified in receiving proof of the population of Skagit county in November, 1900, when the county clerk was elected, and that he was entitled to be paid by the board of county commissioners according to the population of Skagit county, and that the federal census for 1900 is competent evidence to prove this population; that, according to the evidence in this case, the population of Skagit county when the claim was presented, was above fourteen thousand and less than sixteen thousand; that under the act of March 26, 1890, Skagit county was at the time the claim was presented for allowance, in the thirteenth class, and the respondent is entitled to the salary for county clerk within that class.

The judgment of the court below is therefore affirmed.

REAVIS, C. J., and ANDERS, DUNBAR and HADLEY, J.J.,
concur.

FULLERTON, J., (dissenting).—I dissent from the opinion and judgment in this case. The power to regulate the compensation of county officers is vested in the legislature, subject only to the restriction the constitution imposes. These restrictions are that such compensation must be by salary, and must be in proportion to the duties imposed. When, therefore, the legislature, by the act of 1890, classified the counties by population, adopting the federal census of that year as a basis, and fixed the compensation of county officers in accordance therewith, it enacted a constitutional and valid law, binding alike upon the officers affected by it and the courts. Such law being valid then is valid now, unless it be shown that the salary as fixed by that law is not in proportion to the duties the office now imposes upon the officer holding it. Of this there is no pretence in the record before us. The relator rests his case on the naked allegation that the federal census of 1900 shows that the population of his county has outgrown the legislative classification. This, in my judgment, is no reason for increasing his salary beyond that which the legislature has provided.

MOUNT, J., concurs in dissenting opinion.

[No. 3960. Decided June 10, 1901.]

THE STATE OF WASHINGTON *on the Relation of Fremont Campbell*, v. SUPERIOR COURT OF PIERCE COUNTY,

HON. W. H. SNELL, *Judge thereof*.

HOMICIDE — DEATH WARRANT — EFFECT OF AMENDMENT OF STATUTE.

Mandamus will lie to compel a superior court to issue a death warrant in accordance with existing law, although before such death warrant can be carried into execution, the existing law will have been superseded by a later enactment which will go into

effect in the period intervening between the application for the death warrant and the date fixed for the execution. (Fullerton, J., dissents).

STATUTES — CONSTRUCTION PRIOR TO TAKING EFFECT.

The courts will not pass upon the operation and effect of legislative enactments prior to their going into effect. (Hadley and White, JJ., dissent).

Original Application for Mandamus.

Fremont Campbell, Prosecuting Attorney, and *Charles O. Bates*, for relator.

The opinion of the court was delivered by

REAVIS, C. J.—Original application for mandamus. The state, on the relation of Mr. Campbell, prosecuting attorney of Pierce county, moves for a mandate requiring the judge of the superior court to fix a day upon which judgment and sentence of death, theretofore rendered in the case of State of Washington, plaintiff, v. Eben L. Boyce, defendant, shall be executed, and that the superior court issue a death warrant directed to the sheriff of Pierce county, commanding him to execute the judgment and sentence on a day to be fixed by the court therein. It is stated that the superior court refused to fix a day, or any day, for the execution of such judgment and sentence, or to issue a death warrant, solely upon the ground that any day which might be fixed not less than thirty nor more than ninety days from the 6th day of June, would be after the act of the legislature entitled "An act relating to the death warrant, the contents thereof, the return of same, and fixing place of execution, and amending sections 6993 and 6995 of Ballinger's Annotated Codes and Statutes of Washington," approved March 8, 1901 (Laws 1901, p. 100), had taken effect and become a law, and that such law repealed §§ 6993 and 6995, Bal. Code, under which the judgment and sentence must be carried into execution.

To the petition for mandate a general demurrer was interposed by the judge of the superior court, and it was stipulated by relator and respondent that the petition be heard upon its merits.

From the record presented it appears that Eben L. Boyce was duly convicted of the crime of murder in the first degree, and judgment on such conviction entered, and sentence of death in pursuance thereof was made on the 26th day of April, 1900; that thereafter, upon appeal from such judgment to this court, it was, on the 19th day of April, 1901, duly affirmed, and the sentence ordered carried into execution, and the remittitur duly filed in said superior court. The question for consideration is the duty of the superior court to direct the execution of the sentence of death. The existing law applicable to the case is contained in §§ 6993-6996, Bal. Code. Section 6993 substantially declares that when judgment of death is rendered, the warrant shall be signed by the judge and attested by the clerk, and state the conviction and judgment, and appoint a day for the execution, which shall not be less than thirty nor more than ninety days from the time of judgment, and the sheriff or officer to whom a warrant is delivered shall return the same within twenty days after the time fixed for the execution. Section 6994 prescribes the punishment as death by hanging by the neck. Section 6996 provides that when the time appointed for the execution of a prisoner is past, from any cause, the court shall cause the prisoner to be brought immediately before it, and proceed to appoint a day for the carrying into effect of the sentence of death. This law and the provisions for carrying out of the sentence of death were in force at the time the crime for which defendant was convicted was committed, and are now the law; but the respondent declines to issue the death warrant under the existing law

for the reason that the act relating to the death warrant, *supra*, will go into effect before the minimum time for the execution required in the death warrant shall have expired; and counsel for the relator urge the court to construe the future act relating to the death warrant, to determine its effect upon the existing law and its relation to crimes committed before it is in force; and the construction and effect of the intended law have been exhaustively discussed. The probable effect and consequences to the state, society, and the defendant are earnestly impressed upon the court as requiring determination at this time of the force and effect of the contemplated law, which changes the procedure in the execution of the death sentence. However cogent such reasons may be to induce the court to advance the hearing of a cause and to a speedy consideration and decision thereof, no judicial determination can be made until the case is completely before the court for hearing. It is apparent that the act of March, 1901, *supra*, is not the law now before us. Its operation must commence in the future, subject to the contingency of time, subject always to the legislative will. The judicial function is to construe and declare existing law. In those rare cases where, under extraordinary emergencies, judges have expressed opinions in cases not properly before them, such opinions have always been deemed merely advisory, and have not had the force and effect of binding decisions, and especially is this true where constitutional principles are involved; and sound jurists have always been as one in criticizing and animadverting on the impropriety of such opinions. In the case of *Clayton v. Calhoun*, 76 Ga. 270, injunctive relief was asked against the enforcement of a proposed law. The court, in affirming the decree of the inferior court, observed:

“It may be well, however, to add, in approval not only

of the judgment of the chancellor who denied the writ of injunction, but of the main reason on which he rested his judgment, that it would be a stretch of power in the judiciary to restrain by its process, *mesne* or final, a law enacted by the general assembly, in a formative state and stage.

Such stretch of judicial authority would overshadow the law-making prerogative, usurp the functions of a co-ordinate and distinct department of government by interfering with its mode of enacting laws, and violate that paragraph of the bill of rights in the constitution, which declares that 'the legislative, judicial and executive powers shall forever remain separate and distinct.' "

It was also observed by the court in another case (*Scoville v. Calhoun*), at page 269 of the same volume:

"When the law operates upon the private property of an individual, and that is seized or destroyed or confiscated, or the individual is arrested and indicted thereunder for its violation, then that portion of the law thus affecting his private property and personal liberty may be assailed by him as unconstitutional or illegal. . . . They [the courts] will always wait until the law is attempted to be put in operation, and then act against the officer who executes or attempts to execute it, and not against the law-making branch of the government in the general scope of its power."

In the case of *Kansas City, etc., R. R. Co., v. Whitehead*, 109 Ala. 495 (19 South. 705), the court, in the construction of a section of the Alabama code, observed:

"It is true this section was pronounced unconstitutional in a very brief opinion in the case of *Brown v. Alabama Great Southern R. Co.*, 87 Ala. 370. But at the time of the injury the subject of the suit in that case, and at the time of the commencement of the suit, this section of the Code had not legal existence. The Code had not then become operative, as was pointed out in the argument of counsel. Statutes cannot be pronounced unconstitutional at the mere will of courts, or in suits in which they are not involved—not the foundation of any right asserted by

the plaintiff, or matter of defense preferred by the defendant.”

And the decision referred to was not deemed authority in the construction of the law which was then in operation.

The principle was under consideration by the supreme court of Ohio in *State v. Baughman*, 38 Ohio St. 455. There, by joint resolution of the general assembly, the attorney general was directed to institute action in *quo warranto* against certain police commissioners, and to procure therein a decision of the supreme court on several constitutional questions suggested in the resolution. The court observed in the case before it:

“A decision on any of the questions not suggested, not necessary to a determination of the right of defendants to exercise these functions, would not be a judicial settlement of such questions, but would be without authority conferred by the constitution to make it. To be a judicial settlement the question decided must arise in a judicial proceeding, properly before a court of competent jurisdiction. . . . If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision ‘would be of great value to the general assembly’ in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its tendency. Not only this, but it would be an attempt to settle questions of law involving the rights of persons without parties before it, or a case to be decided in due course of law, thus violating that provision of the Bill of Rights which declares that every person shall have a remedy for an injury done him by due course of law.”

It becomes important to inquire who are the real parties in interest here. True, the relator is one. Who is the other? Ordinarily, in the procedure of mandamus and prohibition against the judge of a superior court, the real party in interest is not the court. The judge has no rights

affected, and the rule here has been to assess the costs of such procedure to the real party, other than the judge. A grave question is suggested to the court, involving the rights and the life of a defendant convicted of murder. He is not here, not a party before the court. We must look at the substance. It only requires the suggestion that he is interested in the final determination to conclude that he may be heard. Evidently his rights cannot be foreclosed by any expression in any form where he is not a party.

The conclusion is that a case is not presented which involves an inquiry into the effect and operation of the contemplated law, which may go into effect hereafter. But, under the requirements of the existing law, it is the duty of the superior court to issue the death warrant in accordance with the provisions of the statute, and it is so ordered. The writ will issue.

DUNBAR, ANDERS and MOUNT, JJ., concur.

HADLEY, J., (concurring).—I agree with the majority of the court that the writ asked must issue, because the existing law demands it. But I believe this court should in this case declare the effect of the act of 1901. It is true that act is not yet in force, but the record in this case shows that it will be in force before the warrant of the lower court can be executed. Nothing but an extraordinary session of the legislature and a repeal of the act of 1901, or a modification thereof, can prevent this, and no presumption can be indulged that such an event may happen. The record shows that the lower court refused to issue the warrant on the ground that the act of 1901 will be in force before the warrant can be executed, and he construes that act as taking away the authority of the sheriff to carry the warrant into execution. In view of the gravity of the situation, involving as it does the judicial execution of a prisoner, I believe the court should now construe the

effect of the act of 1901, for the guidance of the sheriff, whose duty it is made, under existing law, to execute the very warrant which it is now ordered shall issue.

WHITE, J., concurs with HADLEY, J.

FULLERTON, J., (dissenting).—I agree with the majority opinion in so far as it decides that the act of 1901 is not before the court, but I do not think that the order directing the trial judge to issue the death warrant should be imperative. It was made to appear before that court, and consequently appears here, that the act of 1901 will be in force before any warrant that may be issued can be carried into execution by the sheriff. The trial court, therefore, when the application was made to it, should have continued the hearing until such time as the question of the power of the sheriff to carry into execution a death warrant could have been lawfully determined; and, this being the duty of the trial court, this court should deny the writ asked for, but should do so with leave on the part of the prosecuting attorney to renew the application when the act of 1901 goes into effect.

[No. 3896. Decided June 15, 1901.]

THE STATE OF WASHINGTON *on the Relation of A. W. Hastie, Respondent*, v. GEORGE B. LAMPING, *as Auditor of King County, Appellant*.

JURY — COMPENSATION — ATTENDANCE UPON COURT.

Under the statute (Bal. Code, § 1609) allowing jurors a certain per diem for each day's attendance on a court of record, jurors are not entitled to compensation for Saturdays, where the court has excused them from Friday evening until Monday morning, for the purpose of hearing motions, although such jurors could not have known prior to Friday evening whether or not they would be called for jury duty the following day, and those jurors living at a distance were unable to reach home and return

June, 1901.] Opinion of the Court—DUNBAR, J.

during the time for which they were excused and were therefore compelled to remain in town even if not on jury duty.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

Walter S. Fulton, for appellant.

A. W. Hastie, for respondent:

Counsel cited *Parker v. Kempton*, 18 Fed. Cas. p. 1144; *Edwards v. Bond*, 8 Fed. Cas. p. 343; *In re Addis*, 28 Fed. 794; *Archer v. Hartford Fire Ins. Co.*, 31 Fed. 660; *Wooster v. Handy*, 23 Fed. 49; *Bloch v. Multnomah County*, 35 Pac. 30; *Hutchins v. State*, 8 Mo. 288; *Robinson v. Chambers*, 54 N. W. 176 (20 L. R. A. 57); *State v. Stewart*, 1 Tayl. (N. C.) 138; *Higginson's Case*, 1 Cranch C. C. 73.

The opinion of the court was delivered by

DUNBAR, J.—The agreed statement of facts in this case discloses that the jurors were on the regular panel duly and regularly summoned and qualified during the years 1897 to 1899, inclusive, and were subject to serve as jurors on Saturdays, but had not received pay from the county for their attendance on the Saturdays when they had been excused by the court, it appearing that it had been the custom ordinarily to excuse the jurors from attendance upon the court from Friday evening until Monday morning at 9:30 o'clock. On the 7th day of January, 1901, the court directed the county clerk to issue certificates to the jurors in question for services rendered in attending upon the court for the Saturdays in question. These certificates were transferred by the jurors to the respondent, who presented the same to the auditor for the purpose of having warrants drawn in payment of the same. The auditor refused to draw the warrants. A writ

of mandamus was applied for, which was issued by Judge Bell of the superior court of King county, and upon the trial of the cause the peremptory writ was ordered by Judge Tallman of the same county. From the judgment of the court in this particular this appeal is taken.

It will thus be seen that the question presented is whether jurors are in attendance, within the meaning of the law, on Saturdays, when they are not physically present, or about the court, by reason of having been excused the evening before from attendance on said Saturdays, and when it was their duty to report again the following Monday. The statute provides what each grand and petit juror shall be allowed for each day's attendance on a court of record. We do not think it can be said that a juror is in attendance on a court of record on a day when he is not subject to jury duty, or not subject to the call of the court, but is by order of the court entirely relieved from the performance of his duty in this respect. The court finds that the time mentioned in said clerk's certificates is for Saturdays, on which said jurors were excused from service from Friday night to Monday morning at 9:30 o'clock, by reason of the court being engaged in hearing motions. It would seem that, if the jurors were excused from service from Friday night to Monday morning, they could not, in any sense, be said to be in attendance on the court. It is true that the finding further is to the effect that none of said jurors were informed, nor could they possibly determine previous to the adjournment of said court on Friday evening, whether or not they would be required to serve as jurors in the trial of causes on the following Saturday, and that one half of said jurors resided in the country, and, by reason of the distance, were unable to reach their homes and return during the short time for which they were so excused. But, while this state

of facts may indicate to a certain extent the imposition of a hardship on the jurors, we do not think it justifies the conclusion of law made by the court that all of said jurors were in attendance on said superior court as petit jurors therein at all times mentioned in said certificates. The finding of fact seems to be inconsistent with the conclusion of law.

A case largely relied upon by the respondent is *Woffenden v. Board of Supervisors of Pima County*, 1 Ariz. 237 (25 Pac. 647), where, under a statute similar to ours, it was held that mandamus would issue to compel the commissioners to allow claims similar to the claims presented in this case. There is no discussion, however, in that case of the point under discussion here, but the contest seemed to be over the right to issue the writ of mandamus to control the action of the board. It was held, however, that the admission by respondents of the facts set up in the petition was equivalent to an admission that the clerk's certificate was properly issued, and left no discretion in the board to reject the claim,—a question which is not raised or discussed in this case. We have examined all the other authorities cited by the respondent, but they do not seem to us to be directly in point. It is insisted by the respondent that the cases cited by counsel for appellant show an entirely different state of facts from those shown by the statement accompanying this case, and are, therefore, not in point. But while the facts are to a certain extent different, and the length of time for which the jurors were excused was much greater, than in the case at bar, the principles announced were not based upon the length of time, and are conclusive on the proposition under discussion. In *Jacobs v. Elliott*, 104 Cal. 318 (37 Pac. 942), it was held that, under a statute providing that jurors shall receive a certain sum per diem for attendance upon court,

a juror was not entitled to fees for the time during which he was dismissed from attendance on the court before his final discharge. In that case it was said:

“The compensation comes, not by virtue of the *quasi* office, but as so much per diem for attendance on the court. . . . it is not doubted but that the superior court may, in furtherance of the public interest, dismiss from attendance upon it for a limited and specified time the jurors in attendance, without finally discharging them from their duties; and as their compensation is only given for attendance, they are not entitled, when so excused, to the per diem fixed by the statute.”

The same rule was announced in *Mason v. Culbert*, 108 Cal. 247 (41 Pac. 464), where the case of *Jacobs v. Elliott, supra*, was cited with approval, and the rule extended to apply to a case where the jurors were excused from attendance after they had been impaneled to try a cause. In that case it was said:

“After he has been drawn as a juror he may be excused from attendance for a definite period, and, after a juror has been impaneled and sworn, the remaining jurors may be excused from attendance until some future day. In such cases they are not ‘in attendance upon the court’ during the period for which they are excused.”

Many other California cases have followed the rule announced in the cases above cited, and we think it is the rule that must be applied in this cause. The statute prescribes the compensation for services of a juror, and his compensation cannot be extended beyond its terms, even though some slight inconvenience or actual hardship may be visited upon the juror. Jury duty might be imposed, and is in some jurisdictions, without compensation at all, and, construing the statute in this instance as we would in any other, we are unable to conclude that it has application beyond the actual physical attendance of the juror on a court of record.

June, 1901]

Syllabus.

The judgment will therefore be reversed, with instructions to deny the writ asked for.

REAVIS, C. J., and ANDERS, FULLERTON, WHITE and MOUNT, JJ., concur.

[No. 3944. Decided June 17, 1901.]

THE STATE OF WASHINGTON *on the Relation of S. E. Barr, Respondent*, v. JOHN D. ATKINSON, *as State Auditor, Appellant*.

STATES AND STATE OFFICERS — PAN-AMERICAN EXPOSITION COMMISSION — BOARD OF WOMEN MANAGERS — DUTIES — RIGHT TO SHARE IN APPROPRIATION.

Under Laws 1901, p. 129, § 3, which provides that the expenses incurred by the honorary members of the board of women managers of the Pan-American Exposition, "appointed from this state to attend said exposition, and who will work in conjunction with the commissioners to be appointed in collecting and caring for art in needlework, etc., and other exhibits to be displayed at said Pan-American exposition," be paid out of the fund appropriated by said act, the commissioners appointed to prepare an exhibit for this state cannot by dispensing with an exhibit of art in needlework deprive said honorary members of the right to work in conjunction with the commissioners in regard to "other exhibits," nor of the right to share in the appropriation therefor.

SAME — EXPENDITURE OF APPROPRIATION — VOUCHERS.

Section 3 of the act of March 15, 1901, which provides that the expenses incurred by the two honorary members of the board of women managers of the Pan-American Exposition appointed from this state shall "be paid out of said fund to be hereafter appropriated, and the auditor is hereby instructed to draw his warrant upon the treasurer for all expenses actually incurred upon the presentation of the proper vouchers therefor," is a complete provision in itself for the payment of such expenses, and the other sections of said act which provide that the appropriation shall be expended for expenses incurred by the commissioners "upon vouchers approved by the commissioners," or "upon the requisition of the state commission," approved by the state

auditor, are inapplicable to the expenses of said members of the board of women managers. (Mount, J., dissents).

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

W. B. Stratton, Attorney General, and *E. W. Ross*, Assistant Attorney General, for appellant.

Allen Weir and *M. G. Royal*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This cause was instituted in the superior court of Thurston county upon relator's petition praying for a writ of mandamus against the respondent, who is appellant here. The petition avers that the appellant is the duly elected, qualified, and acting state auditor of the state of Washington; that the legislature of the state of Washington duly passed an act entitled "An act to provide for the collection, exhibition and maintenance of the products of the state of Washington at the Pan-American Exposition at Buffalo, New York, and making an appropriation therefor," which act became a law on the 15th day of March, 1901 (Laws 1901, p. 129); that the relator and one M. L. T. Hidden were, on or about the 25th day of May, 1900, appointed as honorary members of the board of women managers of said Pan-American Exposition, which appointments were duly made by one William I. Buchanan, director general of said Pan-American Exposition, and said appointments were made upon the designation and recommendation of John R. Rogers, who was then the duly qualified and acting governor of the state of Washington; and that the relator and said Hidden then became, and ever since have been, and now are, duly appointed, qualified, and acting honorary members of the board of women managers of said exposition. It is further

alleged that under the provisions of the legislative act hereinbefore mentioned it is provided that the expenses incurred by the two honorary members of the board of women managers who have been appointed from this state to attend said exposition must be paid out of the appropriation made in said act, and that the state auditor was and is instructed by the terms of said act to draw his warrants upon the treasurer of said state for all expenses actually incurred by the said honorary members in attending said exposition, upon the presentation to him of the proper vouchers therefor; that the relator and said Hidden are the two honorary members referred to in said law whose expenses are required by the terms thereof to be paid out of the appropriation made therein; that on or about the 14th day of April, 1901, at the city of Tacoma, in said state, a meeting was duly held by the duly appointed members of the commission provided for in said act; that the board composed of said commissioners at such time and place was duly organized and empowered to act under said law; that the petitioner attended said meeting and offered to act in conjunction with the members thereof in the discharge of her duties mentioned in § 3 of said law; that the petitioner was informed at said meeting by the said commissioners that she would not be permitted to draw or use for her expenses in attending said exposition any portion of the appropriation created by said law, save and except a small amount to cover the expenses of petitioner incurred on and prior to said date; that said commission refused to audit or allow any bill or voucher for petitioner out of the said fund, other than as stated herein; that said commission, on said 14th day of April, adopted and spread upon its minutes the following:

“On motion duly made, seconded and carried, the executive commissioner was instructed to inform the lady man-

agers heretofore referred to and mentioned in the Pan-American act that there is no space set aside or made available at Buffalo for the ladies' art and needle work exhibit, and therefore that it is the decision of the commission that it dispense with any and all efforts to make a distinctive art and needle work exhibit from the state of Washington at said exposition. And, after a full presentation and discussion of the matter, it was regularly moved, seconded and carried that it is the sense of the commission that no sum of money be permitted to be expended or appropriated for the use of the honorary members of the board of women managers for expenses from the state of Washington to Buffalo in attendance upon the Pan-American exposition."

That under the provisons of said law, and under the appointment of the petitioner, she is required to attend the said exposition in person in the city of Buffalo, which exposition is now open, and will be kept open and continue in carrying out the purposes for which it was created until the 1st day of November, 1901; that the duties of petitioner in connection therewith are and will be to represent the state of Washington, and to work in conjunction with the commissioners hereinbefore mentioned, in collecting and caring for and exhibiting the exhibits from said state of Washington to be displayed at said Pan-American exposition, and to represent the state upon the board of women managers thereof, so that the provisions of the law hereinbefore referred to may be carried into effect; that on the 25th day of April, 1901, the petitioner presented to the appellant a proper voucher for her necessary and reasonable expenses for transportation from Olympia, Washington, to Buffalo, New York, the amount thereof being the sum of \$67.75, which amount is the correct amount required to purchase a ticket by railroad from the petitioner's city and residence to the point where said exposition will be held, and is a reasonable and necessary item of expense incurred and

June, 1901.] Opinion of the Court—HADLEY, J.

paid by the petitioner for the purpose of attending said exposition; that said voucher consisted of a receipt of the agent at Olympia of the Northern Pacific Railroad company for said money, accompanied by the affidavit of the petitioner showing that said money had been paid for said purpose; that upon the presentation of said voucher to appellant, the petitioner demanded of and from him as said auditor a warrant upon the state treasurer, and against the appropriation created in said law in favor of petitioner, and for said amount; that the appellant thereupon refused and neglected, and does now refuse and neglect, to issue the warrant to petitioner as demanded for said sum, or for any portion thereof. Upon the above statement the petitioner prays that a writ of mandamus be issued, directed to and commanding appellant to issue and deliver to her the warrant demanded. A demurrer was interposed to the petition by appellant, which was overruled, and appellant's exception duly noted. Thereupon appellant refused to plead further, and judgment was entered that a peremptory and permanent writ be issued directing appellant to issue to relator a warrant upon the treasurer of said state against the appropriation referred to in the petition in the sum of \$67.75, and that the relator recover from appellant her costs. From said judgment the defendant appeals.

Section 3 of the act approved March 15, 1901, includes the following provision:

"The expenses incurred by the two honorary members of the board of women managers, who have been appointed from this state to attend said exposition, and who will work in conjunction with the commissioners to be appointed in collecting and caring for art in needlework, etc., and other exhibits to be displayed at said Pan-American exposition be paid out of said fund to be hereafter appropriated, and the auditor is hereby instructed to draw his warrant upon the treasurer for all expenses actually incurred upon the presentation of the proper vouchers therefor."

It is urged by the appellant that, inasmuch as the commissioners appointed in pursuance of said act determined, as shown by the minutes of the meeting above mentioned, to dispense with an art in needlework exhibit at said exposition, there no longer remains any duty for said honorary members to discharge within the provisions of said law, and therefore no expense can be incurred by them which can be lawfully paid from said appropriation. It will be observed, however, that the above quoted portion of the section provides for the payment of the expenses incurred, not only in connection with "collecting and caring for art in needlework, etc.," but also in connection with "other exhibits to be displayed." It thus seems clear to us that it was the legislative intent that these honorary members should act in conjunction with the commission in relation to other exhibits. It is a reasonable deduction from the language of the statute quoted that the legislature intended to recognize the purpose for which such honorary membership was created, in the belief that such members could usefully discharge such duties as appropriately belonged to women in connection with an exhibit designed to represent the state of Washington in all phases pertaining to her material development and the enterprise of her people.

Appellant contends,—and, indeed, not without force,—that money can be drawn from said appropriated fund in three ways only, viz., under the provisions of §§ 2, 8, and 9 of the act of March 15th. Said sections are, respectively, as follows:

"Sec. 2. Each of the said commissioners hereby appointed shall serve without salary but is allowed his actual necessary expenses incurred in attending meetings of said board in the discharge of his duties to be paid out of the money hereby appropriated, upon vouchers approved by the commissioners."

"Sec. 8. Such commission may issue certificates of in-

debtedness with sworn vouchers attached thereto. All such certificates shall be presented to the auditor of the state, who shall issue warrants upon the treasurer of the state for the same providing that the certificates and warrants so drawn shall in no case exceed the amount hereafter appropriated."

"Sec. 9. To carry out the purposes and provisions of this act the sum of twenty-five thousand (\$25,000) dollars is hereby appropriated out of any money in the treasury not otherwise appropriated. The state treasurer is hereby directed to pay the money to the executive commissioner from time to time upon the requisition of the state commission by its president and secretary and approved by the state auditor."

It will be observed that each of said sections requires the authority of the commission itself for payments from the fund appropriated, and there can be no doubt that all payments made for expenses incurred by the commission itself or the members thereof must be with the authority and approval of the commission. It becomes our duty, however, to interpret the statute so as to give force to all of its provisions, if the same can be made to consist one with the other. These so-called "honorary members" are not members of this commission. They were appointed by the director general of the Pan-American exposition, upon the recommendation of the governor of this state, as honorary members of the board of women managers of said exposition. Presumably, this was an honor and recognition extended to all the states, and, inasmuch as the members from this state had been appointed before the passage of the law above mentioned, the legislature clearly intended, by the provision of § 3 above set forth, to provide for payment of their expenses out of the fund appropriated by that act. The manner of payment is specifically outlined in the section, which provides that payments shall be made. It is a method restricted to the one purpose, and is

wholly distinct from that provided in other sections for payment of expenses incurred by the commission itself, or by the members thereof. It is as follows:

“And the auditor is hereby instructed to draw his warrant upon the treasurer for all expenses actually incurred upon the presentation of proper vouchers therefor.”

Appellant contends that the words “proper vouchers” must mean vouchers audited and approved by the commission. We believe, however, that the words refer only to such vouchers as shall satisfy the auditor that legitimate expenditure has been made, within the scope of the purpose stated in § 3, in relation to said honorary members. The auditor is left to exercise the same discretion with which he is vested when auditing claims against the state not required by law to be audited by other officers or persons. The auditor is given this general authority under § 134, subd. 1, Bal. Code. In the exercise of the auditor’s discretion it is not to be presumed that any extravagant or unlawful expenditure will be approved by him. The voucher presented to him in this case was a railroad ticket from Olympia to Buffalo, accompanied by the affidavit of petitioner that she had purchased and paid the sum of \$67.75 for it, for the purpose of providing her passage to Buffalo that she might attend the exposition as such honorary member. Her attendance at such exposition is expressly made a part of her duties in the law, and, if she acts in conjunction with the commission from this state, the reasonable expenses of such attendance are to be paid. The petition shows that she is endeavoring to act in conjunction with the commission by preparing to go to Buffalo for that purpose, and, since the expense of transportation is a necessary incident to her attendance, she is entitled to a warrant for the amount shown.

Since this cause was submitted in this court, the legisla-

June, 1901.]

Dissenting Opinion—MOUNT, J.

ture of this state, while convened in special session, did, on June 12, 1901 (Ex. Sess. Laws 1901, p. 14), pass an act amending § 3 of the act of March 15th aforesaid. Said amendatory act contains an emergency clause, and was approved by the governor on June 13, 1901. Said last-named act having now become a law, this court must take judicial cognizance of its existence. The amendment contains substantially the same provisions as the original § 3, with the omission of all that portion relating to payment of the expenses of said honorary members. The amendment, therefore, repeals the aforesaid provision of the original § 3, and no provision is now left for the payment of future expenses incurred by said honorary members. The expense shown by the record in this case was incurred, however, during the existence of the former provision of the law. Relying upon the law, the petitioner incurred the expense in good faith, and an obligation was thereby cast upon the state to pay the same from said fund. The right to enforce such obligation existed in her favor against the state when the repealing act became a law, and such right cannot be thereby taken away.

The judgment of the lower court is affirmed, with costs taxed against appellant.

REAVIS, C. J., and ANDERS, DUNBAR and WHITE, JJ., concur.

FULLERTON, J., dissents.

MOUNT, J. (dissenting).—I dissent for the reason that the whole act should be construed together. The term “proper vouchers,” as used in § 3 thereof, means vouchers approved by the president and secretary of the commission, as required by § 9. Until such voucher, so approved, is presented to the state auditor, no writ should issue against him.

[No. 3854. Decided June 18, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. FLOYD DUNLAP, *Appellant*.

ASSAULT WITH INTENT TO RAPE — INFORMATION — ALLEGATION OF PRESENT ABILITY.

An information charging derendant with the crime of assault with intent to commit rape upon another is not insufficient by reason of failure to allege defendant's present ability to carry his intent into execution.

SAME — SUFFICIENCY OF SENTENCE INFLICTING PORTION OF PENALTY IMPOSED.

Where the statute provides that a person convicted of assault "shall be fined in any sum not exceeding \$500, to which may be added imprisonment in the county jail not exceeding six months," the action of the court in sentencing a person convicted of assault to imprisonment for five months, without first imposing a penalty by fine, is not erroneous, as being beyond the jurisdiction of the court to inflict.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

Hugh Farley and *A. A. Knight*, for appellant.

Fremont Campbell, Prosecuting Attorney, and *Walter M. Harvey*, for the State.

The opinion of the court was delivered by

DUNBAR, J.—An information was filed against the defendant, charging him with the crime of assault with attempt to commit rape, the charging part of which is as follows:

"That the said Floyd Dunlap, in the county of Pierce, in the state of Washington, then and there being, unlawfully, violently and forcibly in and upon one Mabel Stevens, a female person under the age of 18 years, to-wit: of the age of 9 years, did make an assault, with intent then and there

June, 1901.] Opinion of the Court—DUNBAR, J.

unlawfully and feloniously to ravish and carnally know the said Mabel Stevens, contrary," etc.

A demurrer was interposed to the information, to the effect that the facts charged did not constitute a crime. The demurrer was overruled and a trial had, which resulted in the following verdict by the jury:

"We, the jury in the case of the State of Washington, plaintiff, v. Floyd Dunlap, defendant, find the defendant guilty of assault."

A motion in arrest of judgment was made on the grounds (1) that the facts stated in the information did not constitute the crime or misdemeanor for which a verdict of guilty was brought in by the jury; (2) that there was no information upon which to base a verdict of guilty of assault; (3) that the defendant had been found guilty of an offense with which he had never been charged; and (4) that the defendant had been found not guilty of the offense charged. The motion was overruled and the following judgment was pronounced:

"Ordered, adjudged, and decreed that the said defendant, Floyd Dunlap is guilty of the crime of assault, and that he be punished therefor by confinement in the county jail for the term of five months."

Two points are discussed by the appellant: First, that the court should have granted the defendant's motion in arrest of judgment, and discharged the defendant; second, that the sentence is void, as beyond the jurisdiction of the court to inflict. It will be observed that the first point embraces, also, the question raised by the demurrer. Appellant's objection to the information is that it does not appear therefrom that the defendant had the ability to carry the attempt into execution, and it is claimed that the ability to carry the attempt into execution is the condition which makes the attempt punishable as an assault. This question

was inferentially decided against the contention of the defendant in *State v. Ackles*, 8 Wash. 462 (36 Pac. 597), and directly by this court in *State v. Levan*, 23 Wash. 547 (63 Pac. 202), where it was held that an indictment for assault with intent to commit murder which charged the defendant in the following words: "An assault did make in and upon the person of the said," etc., was not insufficient for failure to charge defendant's present ability to carry his intent into execution; and where the court in its opinion said: "It would seem that ability to carry such attempt into execution is to be presumed from the use of the term 'assault.'"

On the second proposition it is claimed that, inasmuch as the statute provides that the person convicted of assault "shall be fined in any sum not exceeding \$500, to which may be added imprisonment in the county jail not exceeding six months," the court was not warranted in imposing the penalty of imprisonment without first exhausting the fine provided by the statute. No objection was made to the penalty at the time it was imposed, the trial court's attention was not called to the alleged invalidity of the judgment, and it was not given an opportunity to correct its judgment, if it needed correction. But, in addition to this, the court did not exceed the limit of punishment prescribed by the statute and therefore did not exceed its jurisdiction in pronouncing judgment. The defendant is not in a position to complain because the court did not impose as heavy a penalty as it might have imposed under the statute.

The information being sufficient and the judgment being authorized by law, the same is affirmed.

REAVIS, C. J., and FULLERTON, MOUNT, WHITE and HADLEY, JJ., concur.

[No. 3947. Decided June 18, 1901.]

THE STATE OF WASHINGTON *on the Relation of W. B. Stratton, Attorney General*, v. BOYD J. TALLMAN, *Judge of the Superior Court of King County.*

WILLS — CONTEST — MANDAMUS — ADEQUATE REMEDY AT LAW.

Mandamus will not lie to compel the superior court to hear and determine a motion praying for the vacation of an order admitting a will to probate made within a year after the probate of the will, since the statutes (Bal. Code, §§ 6110, 6112) afford a plain, speedy, and adequate remedy by providing that a will admitted to probate is binding on all persons, if not contested within one year, and by providing a plain procedure for determining all questions affecting its validity, which may be raised by contest within such year.

Original Application for Mandamus.

W. B. Stratton, Attorney General, C. C. Dalton and E. W. Ross, for relator.

Pratt & Riddle, W. F. Hays, Jesse P. Houser and J. W. Robinson, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Original application for mandamus. In September, 1900, John Sullivan, a resident of King County, died, leaving a large estate, both real and personal, in that county. Letters of administration were issued by the superior court thereafter. On the 8th of March, 1901, following, Marie Carrau, of Seattle, filed a written paper, purporting to be a nuncupative will of deceased, praying that such will might be admitted to probate. Citation was issued, delivered to the sheriff, and immediately returned, stating there were found no heirs or next of kin of deceased. Thereafter, upon the same day, proof was made and an order entered admitting the will to probate.

Afterwards a petition for an order of distribution of the estate under the will was filed, and the hearing of such petition was set for the 10th of May, 1901. Before the petition for distribution was heard, the attorney general, on behalf of the state, filed a motion in the probate court, praying for the vacation of the order admitting the will to probate and to set aside all the proceedings leading up to the probate of the will, upon the grounds that the court acquired no jurisdiction to hear any evidence in support of the will because no citation was issued as required by law, because the citation was issued on the day it bears date, and at the time the will was presented to the court and immediately returned by the sheriff without making any effort to find any of the heirs of deceased or any person interested in the estate, and because deceased never made or attempted to publish and declare the will. Thereupon the court declined to consider or decide the motion, on the ground that the state could not properly appear in the proceeding. The attorney general applied here for a mandate directing the probate court to consider and determine the motion.

The extraordinary writ will not be issued if relator has a plain, speedy, and adequate remedy at law. Relator urges that under subd. 8, of § 4620, Bal. Code, the state is interested in testing the validity of the will, because, in the event of the establishment of intestacy and upon the failure of heirs, the estate escheats to the state. The effect of the order admitting a will to probate, either written or nuncupative, is declared in § 6108, Bal. Code, "as effectual in all cases as the original would be if produced and proven," and such effect by § 6112 is declared binding upon all persons if its validity shall not be contested within one year after the probate or rejection of the will. Assuming that the state may have such contin-

June, 1901.]

Syllabus.

gent interest in the estate as to have the real truth of the existence and validity of the will determined, it appears there is a plain procedure, which is speedy and adequate, pointed out in § 6110, Bal. Code, by which issues may properly be made up and tried and determined, respecting all questions affecting the regularity of the execution or of the validity of the will, and the superior court, entertaining such a suit, may fully protect such rights in the estate by such stay of proceedings in the procedure in probate as may be necessary or effective.

The conclusion, therefore, is that the appropriate procedure is designated in § 6110, *supra*, and there is no necessity shown for a mandate from this court. Writ denied.

FULLERTON, ANDERS, DUNBAR, MOUNT, WHITE and HADLEY, J.J., concur.

[No. 3913. Decided June 20, 1901.]

T. J. HOWLEY, *Respondent*, v. M. R. MADDOCKS, *Appellant*.

25 297
138 590

BROKERS—ACTION FOR COMMISSIONS ON SALE OF REAL ESTATE—
EVIDENCE — SUBSEQUENT IMPROVEMENTS.

In an action to recover a commission agreed upon between plaintiff and defendant for the sale of the latter's farm, which defendant refused to sell upon the production of a purchaser ready and willing to pay the price, evidence that defendant had improved the farm and altered its condition is inadmissible for the purpose of showing that any price previously fixed thereon was thereby necessarily changed, when the plaintiff had no knowledge of the altered conditions.

Appeal from Superior Court, King County.—Hon. ROGER S. GREENE, Judge *pro tem*. Affirmed.

Ballinger, Ronald & Battle, for appellant:

Counsel cited *Lipe v. Ludewick*, 14 Ill. App. 372, upon the point that the court erred in refusing to permit the defendant to show that he had improved his place and altered its condition, so that any price he may have previously fixed thereon would not be considered as the selling price of the property.

Henry B. Madison and Root, Palmer & Brown, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action by the respondent against the appellant to recover the sum of \$500 for the alleged sale of a certain farm in King county. The complaint alleges that the plaintiff and defendant entered into an agreement whereby the plaintiff agreed to use his best efforts to secure a purchaser for a forty acre farm, with the livestock, etc., belonging to defendant, at the net price of \$6,500, and that the plaintiff was to have whatever amount the farm was sold for over and above the \$6,500; alleging the sale of the property to one McKnight for \$7,000, and the refusal of defendant to pay to plaintiff \$500. The answer was a denial of all the allegations of the complaint, excepting that of the refusal to pay the said \$500. The case was tried before the Hon. Roger S. Greene, judge *pro tempore*, without the aid of a jury; and the judge found that the defendant had requested and authorized the plaintiff to secure a purchaser for the said farm, and agreed to pay said plaintiff, as commission, any sum or amount which he might obtain for said property over and above the sum of \$6,500; that, pursuant to said authority, the plaintiff did secure a purchaser, which purchaser was able, ready, and willing to pay the

June, 1901.] Opinion of the Court—DUNBAR, J.

sum of \$7,000 in cash for said property; that upon securing said purchaser the plaintiff immediately notified defendant thereof, and at the earliest opportunity brought the purchaser to defendant, who then and there refused to sell said property to said purchaser; that the failure to consummate the sale was owing entirely to the refusal of the defendant to sell said property; and that demand had been made. As a conclusion of law, the judge found that the defendant was indebted to plaintiff in the sum of \$500, and entered judgment for the same, and for costs and disbursements.

It was the contention of the appellant upon the trial that he had not authorized the respondent to sell this particular tract of land, which was known as "The Maples," but that he had authorized him at one time to sell two tracts of land which he had, including "The Maples," for \$10,000, and that that was the only transaction he had had with him in regard to the sale of the lands. The testimony is brief, but is exceedingly conflicting in many essential particulars. It would serve no good purpose to review it in detail, but it is sufficient to say that, from an examination of all the testimony, we do not think we would be warranted in disturbing the conclusion reached by the judge who tried the cause. There is one legal error assigned, viz., that the court erred in refusing to permit the defendant to show that, subsequent to the time the alleged contract had been made, the defendant had improved said place and altered its condition, so that any price he may previously have fixed thereon would necessarily have been changed. If under any circumstances the court would have been justified in admitting testimony of this kind for the purpose of changing the contractual relations existing between the parties, it certainly was not admissible under conditions as shown by the record in this

case; for when the question was offered the court asked if the changes had been made within the knowledge of the respondent, and it was admitted that that fact could not be shown.

No error having been shown, the judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT and HADLEY, JJ., concur.

[No. 3933. Decided June 21, 1901.]

LYMAN C. SMITH, *Appellant*, v. CITY OF SEATTLE *et al.*,
Respondents.

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29 459

MUNICIPAL CORPORATIONS — LAYING WATER MAINS — ASSESSMENT
ACCORDING TO BENEFITS.

Under the laws of this state, which authorize cities to make local improvements and pay therefor by assessment upon the property specially benefited, and under Laws 1899, p. 234, which recognizes the laying of a water main to be a local improvement in the same class as the grading of a street, the city of Seattle has power, under its charter passed in conformity to such general laws, to create a local assessment district for the purpose of laying a water main and charge the cost thereof against property owners according to benefits to their real property in such district.

SAME — LOCAL IMPROVEMENT BONDS — POWER TO ISSUE FOR LAYING
WATER MAIN.

Laws 1899, p. 234, which authorizes the issuance and sale of bonds by cities to pay for local improvements is applicable to the city of Seattle, by way of amendment to the powers conferred by the general incorporation law under which it had been incorporated; and under that act and the provision of the Seattle charter adopted pursuant thereto (Seattle charter, art. 8, § 11, subd. 1) which recognize water mains as in the nature of local improvements, the city of Seattle has power to provide for the payment of the expense of laying water mains by the issuance of local improvement bonds.

SAME — CONSTITUTIONAL LIMIT OF INDEBTEDNESS.

The provision of the state constitution (art. 8, § 6) which authorizes cities to become indebted in excess of the limitation

June, 1901.]

Opinion of the Court—WHITE, J.

upon general municipal indebtedness, for the purpose of supplying such cities with water, artificial light and sewers, cannot be construed as a prohibition upon the method of payment for water mains other than out of a general fund for that purpose nor as a limitation on the legislative power to vest corporate authorities with power to make local improvements by special assessment.

SAME — INAPPLICABLE TO LOCAL ASSESSMENT DISTRICTS.

The limitation in art. 8, § 6, of the constitution against cities incurring an indebtedness for water, artificial light, and sewers in excess of the five per cent. additional to the amount allowed for general municipal indebtedness has no application to indebtedness by local assessment districts in the laying of water mains, in which the cost is chargeable against the property benefited.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Clise & King and *E. F. Blaine*, for appellant.

W. E. Humphrey and *Edward Von Tobel*, for respondents.

The opinion of the court was delivered by

WHITE, J.—The complaint in this action in substance alleges that the city of Seattle is a city of the first class; that the city has passed an ordinance providing for the laying of a water main, with the necessary gates, tees, crosses, fire hydrants and other appurtenances for a reasonable water service and fire protection, along a certain street in said city; that the plaintiff is the owner of a lot fronting on said street; that for the purpose of paying for said water main and its gates, etc., the city has created a local improvement district, and that the lot of the plaintiff is in said district; that the ordinance provides that the property abutting on the street along which the main is laid, especially benefited thereby, shall bear the costs of construction; that R. H. Thomson, Frank N. Little, and Luther B. Youngs constitute the board of public works

of said city; that said board of public works is about to let a contract for the construction of said water main, etc., and by so doing will create a cloud upon the title of the plaintiff, and will create an apparent lien upon said premises for the sums assessed against the same for said water main, etc. The ordinance directing the laying of the water main is referred to and made a part of the complaint. It provides that assessments be levied and collected upon all lots and parcels of land benefited by said improvement, to defray the cost and expenses thereof, that local improvement district bonds be issued, and that said assessment shall become a first lien upon all property liable therefor for the payment of said bonds; that the mode of payment shall be by the mode of "Payment by Bonds," as provided by an act of the legislature of the state of Washington entitled "An act authorizing the issuance and sale of bonds by cities to pay for local improvements," etc., approved March 14, 1899 (Laws 1899, p. 234). The ordinance establishes a local improvement district by metes and bounds, in which the plaintiff's lot is included, and provides that the property within the district, and none other, shall be deemed to be the property specially benefited, and that the cost and expenses of the improvement, including necessary incidental expenses, shall be defrayed by the collection of a special assessment upon the property in said district, except 18 per cent. of the same, exclusive of fixed expenses thereon, which shall be paid from the water fund of the city. The complaint further alleges that in 1890 the city of Seattle purchased its water plant and issued its general bonds therefor; that in 1892 it issued its general bonds in the sum of about \$1,000,000, and that the money received from said bonds was expended principally in laying water mains along the streets of the city, and the interest there-

June, 1901.]

Opinion of the Court—WHITE, J.

on is met and paid by a general tax on all the property within said city; that the city had also just finished what is known as the "Cedar River Water Extension," to the existing water works, at a cost of about \$1,200,000, which has been paid for by warrants against the water fund of the city, and which the city binds itself to redeem in an amount not less than \$100,000 per year out of its water fund, or from any source the city may desire, the city reserving the right to make such payments in such amounts as it may desire on January 1st and July 1st of each year after January 1, 1902. The complaint also alleges that the city charges for water supplied to its inhabitants certain fixed rates, and that these rates are in excess of the actual cost to said city of the water supplied; that the main provided for by the ordinance in question is for the purpose of delivering water to the people residing on the street on which the main is to be laid, and for which water the city will require payment in advance at fixed rates, in excess of its actual cost to the city. It is also alleged that the plaintiff appeared before the city council and objected to the proposed improvement before the same was ordered. The objections so made are set out in the complaint. An injunction is prayed for, to restrain the defendants from laying down the water main, under said ordinance, in front of the plaintiff's premises, at the cost and expense of the abutting property in said district. To the complaint a demurrer was interposed and sustained. The plaintiff elected to stand upon his complaint. The defendants accordingly had judgment. From the judgment this appeal is prosecuted.

The constitution provides that corporations for municipal purposes shall not be created by special laws, but that the legislature by general law shall provide for such

incorporation; that the charters of all cities shall be subject to and controlled by general law; that a city containing a population of 20,000 inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state. Constitution, art. 11, § 10. The city of Seattle has more than 20,000 inhabitants, and, under authority conferred in the constitution, has framed its own charter. By the power given under the provision of the constitution cited, the legislature has provided that cities of the first class shall be organized and governed according to the law providing for the government of cities having a population of 20,000 inhabitants. Bal. Code, § 734. In the act providing for the government of cities having a population of 20,000 inhabitants, it is provided that such cities shall have power

“To provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof; . . . To determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor; to provide for erecting, purchasing or otherwise acquiring water works, within or without the corporate limits of said city, to supply said city and its inhabitants with water, or to authorize the construction of same by others when deemed for the best interests of such city and its inhabitants, and to regulate and control the use and price of the water so supplied;”

and shall have power

“To provide for laying and collecting taxes on real and personal property for its corporate uses and purposes, and to provide for the payment of the debts and expenses of the corporation; . . . To borrow money for corporate purposes on the credit of the corporation, and to issue negotiable bonds therefor, on such conditions and in

June, 1901.]

Opinion of the Court—WHITE, J.

such manner as shall be prescribed in its charter; but no city shall, in any manner or for any purpose, become indebted to an amount in the aggregate to exceed ten per centum of the value of the taxable property therein, to be ascertained by the last assessment for city purposes previous to the incurring of such indebtedness." Bal. Code, § 739.

Many other powers are given by § 739, *supra*, but for the purposes of this case it is unnecessary to enumerate them. It is also provided in the same act that a city adopting a charter under its provisions should have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated or not in the act; and that the rule that statutes in derogation of the common law should be strictly construed should have no application, but that the same should be liberally construed for the purpose of carrying out the object for which it was intended. Bal. Code, §§ 741, 742. This act was passed to carry out the mandatory provision of the constitution that the legislature should by general laws provide for the incorporation of cities, and that cities and towns should be subject to and controlled by such general laws. To this act and general laws we must look for the powers of such corporation, and the powers so given must control unless they clearly contravene some other constitutional provision.

The constitution, in addition to the powers conferred by § 10, art. 11, *supra*, provides that

"The legislature may vest the corporate authorities of cities, towns and villages with the power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all

municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Constitution, art. 7, § 9.

It will be observed that equality of taxation under this section applies only to general taxation for corporate purposes. The part of the section relating to local improvements permits taxation according to local benefits. The city charter of the city of Seattle provides that:

"Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any part of the streets, lanes, alleys, squares or places of the city to be graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, and to order sidewalks, sewers, manholes, culverts, bulkheads, retaining walls, *water mains*, curbing and cross walks to be constructed or repaired therein; and to order any and all work to be done which shall be necessary to complete the whole or any portion of the said streets, lanes, alleys, squares or places; and the city council may levy and collect an assessment upon all lots or parcels of land specially benefited by *such improvements* to defray the whole or any portion of the cost and expense thereof, which assessment shall become a first lien upon all property liable therefor, prior and superior to all other liens and encumbrances." Charter, City of Seattle, art. 8, § 11, subd. 1.

This provision of the charter was adopted in March, 1900. The legislature in 1899 passed an act authorizing the issuance of bonds by cities to pay for local improvements. The first section of that act reads as follows:

"Whenever any city shall have power and authority vested in it by its charter or by any law of this state to order or cause the whole or any part of the streets, lanes, alleys, squares or public places of such city to be graded, re-graded, planked, re-planked, graveled, re-graveled.

June, 1901.]

Opinion of the Court—WHITE, J.

piled, re-piled, paved, re-paved, macadamized, re-macadamized, capped, re-capped, or to order or cause sidewalks, sewers, man-holes, culverts, curbing, gutters, water mains, or crosswalks to be constructed or to order or cause to be made any local improvement whatever, and to levy and collect assessments upon the property benefited thereby or abutting, adjoining, contiguous or approximate thereto, to defray the whole or any portion of the cost and expense of any such improvement, the proper authorities of such city may, in their discretion, provide for the payment of the cost and expense of such improvement by bonds of the district, which shall include the property liable to assessment for the payment of the cost and expense of such improvement according to the charter of such city, issued to the contractor, or by the proceeds of such bonds to be issued and sold as hereinafter provided." Laws 1899, p. 234.

Section 4 of this act provides that in all cases where any city shall issue bonds as provided in the act, to pay the cost and expense of any local improvement, the said cost and expense shall be assessed against the lots and parcels of land, which under the provision of law, and the charter of such city, shall be liable therefor. This act must be regarded as an amendment to the general incorporation laws theretofore enacted by the legislature under § 10, art. 11, of the constitution. The city of Seattle has declared the laying of a water main to be a local improvement, the same as the grading of a street. The legislature has recognized and declared it to be a local improvement in the same class as the grading of a street. To the legislature, by the constitution, was confided the duty, by general laws, of defining and limiting the powers of municipal corporations. By the express provision of § 10, art. 11, of the constitution, all city charters framed or adopted by authority of the constitution shall "be subject to and controlled by general laws." Every act of the legislature is presumed to be valid and consti-

tutional until the contrary is shown. All doubts are resolved in favor of the validity of the act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the constitution and avoid the consequences of unconstitutionality.

“Legislators, as well as judges, are bound to obey and support the constitution, and it is to be understood that they have weighed the constitutional validity of every act they pass. Hence the presumption is always in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against it; and the courts will not adjudge it invalid unless its violation of the constitution is, in their judgment, clear, complete, and unmistakable.” Black, *Interpretation of Laws*, p. 93, and cases cited.

A statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute is unjust or oppressive or impolitic, or that it conflicts with a spirit supposed to pervade the constitution, but not expressed in words. *Sawyer v. Dooley*, 21 Nev. 390 (32 Pac. 437); *Wadsworth v. Union Pacific Ry. Co.*, 18 Colo. 600 (33 Pac. 515, 36 Am. St. Rep. 280, 23 L. R. A. 812).

There is nothing in our constitution imposing specific restrictions upon the power of the legislature to incorporate cities and give to such the municipal powers we have heretofore pointed out, including the power to maintain water works, although the city may regulate and collect pay for the water used, and including the power to create local districts for the construction of water mains. It has been held in this country generally that water works for the supplying of cities and towns with water are undoubtedly for public and municipal purposes, and that

June, 1901.]

Opinion of the Court—WHITE, J.

the legislature may confer authority upon municipalities to erect and operate such works, or to purchase works already established, and to that end they may incur expenditures, levy taxes, issue bonds and exercise the right of eminent domain. 29 Am. & Eng. Enc. Law, p. 2, and cases cited.

Cooley on Taxation, in speaking of water pipes in streets, says:

“Of these it has been said that ‘the benefits are local, as the use of the water must necessarily be mostly restricted to the benefit of the property on the lines, both for domestic purposes and the extinguishment of fires. The effect of supplying the streets with water is to enhance the value of the dwelling-houses thereon. The maintenance of the pipes and the supplying of water are necessarily a continuing expense,’ and for these reasons the assessment of the cost upon adjacent property is within the general principle of local assessments.” Cooley, Taxation (2d ed.), 620; *Allentown v. Henry*, 73 Pa. St. 404; *Northern Liberties v. St. John’s Church*, 13 Pa. St. 104; *Allen v. Drew*, 44 Vt. 174; *Hughes v. Momence*, 163 Ill. 535 (45 N. E. 300).

REDFIELD, J., in *Allen v. Drew*, *supra*, explains the principle of such assessment, and says:

“It is not easy to see any distinction between an assessment for building a sewer or sidewalk, and an aqueduct. They are each, in degree, a general benefit to the public, and a special benefit to the local property, both in the uses and in the enhanced value of the property. The proprietor may, indeed, leave his house tenantless, and his vacant lots unvisited, but the assessment is not, for that reason, void. Such assessments are justified on the ground that the subject of the tax receives an *equivalent*.”

“The only essential elements of a ‘local improvement’ are those which the term implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city. If it does this,—rendering the property more

attractive and comfortable, and hence more valuable for use,—then it is an improvement. . . . This construction is fully warranted by the definition of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellency enhanced, or the like;' or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.' " *State v. Reis*, 38 Minn. 371 (38 N. W. 97).

The legislature has authorized the payment by cities for water mains by local assessments, the issuance of bonds, etc. (Laws 1899, p. 234.) The city of Seattle falls within the class of cities mentioned in the act. The legislature has power under the constitution to authorize local improvements, and discretion, which ordinarily courts cannot review, to decide on what is a local improvement. When this discretion is exercised, courts should not interfere unless it plainly and clearly appears that the improvement is not such as can be recognized as being local in its nature. *State v. Maginnis*, 26 La. An. 558; *State v. Clinton*, 26 La. An. 561; Cooley, Taxation, 609.

The constitution, when limiting general county, city, town, school district, and other municipal indebtedness to one and one-half per centum of the taxable property, provides that any city or town, with the assent of three-fifths of the voters therein, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional, for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality. Constitution, § 6, art. 8. This court has held that the indebtedness here provided for is in excess of that provided for general municipal purposes, and is for the special purpose of supplying water, light,

June, 1901.]

Opinion of the Court—WHITE, J.

and sewers. *Austin v. Seattle*, 2 Wash. 667 (27 Pac. 557). It is urged by the appellant that, inasmuch as the city is authorized to incur this special indebtedness for the three defined purposes, therefore it is the intention of the constitution to prohibit any other method for the payment of water mains than out of a general fund provided for that purpose. It will be observed that there is no obligation on the part of the city to use any part of the money borrowed for water. The city may use the entire sum for lights or sewers, or for either one of these purposes, just as the municipal authorities, in their discretion, may determine. To hold, so far as the construction of water mains is concerned, that this provision of the constitution is a limitation on the legislative power to vest corporate authorities of cities with power to make local improvements by special assessment or by special taxation of property benefited, or to frame general laws of incorporation providing for such powers, or of the right of the legislature to control and regulate the subject by general laws, is to read something into the constitution not contemplated by the framers thereof. Such a construction would do violence to the well established rule heretofore cited,—that a statute can be declared unconstitutional only when specific restrictions upon the power of the legislature can be pointed out. The mere fact that money borrowed by the city under this clause of the constitution, or from its general municipal fund, has been used to purchase water works and extend water mains in aid of the general system, in no wise militates against the right to extend other mains by means of the local improvement system. Constitutions are to be construed liberally and on broad general lines. "Narrow and technical reasoning," says Judge Cooley, "is misplaced when it is brought to bear upon an instrument framed by the people themselves, for

themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." Cooley, Constitutional Limitations (6th ed.), 73.

When the constitution was framed it was well known that there were cities growing rapidly in population, that there was an inadequate supply of water, and that in most instances the supply would have to be conducted in aqueducts for a long distance before reaching the city; and under such circumstances it is reasonable to presume that the excess indebtedness authorized was *to aid* in the procurement and distribution of such water supply. Because a large sum of the money borrowed has been used in this particular case in extending water mains in the city is no reason for holding that local district assessment cannot be resorted to in supplying districts of the city which are at present without water, or where there is an inadequate supply. It would be just as reasonable to hold that, because a city had improved some of its streets from the general fund, therefore it could not create an assessment district for a particular street. We know that in supplying cities with water it is necessary to lay upon some of the streets large mains, from which lateral mains conduct the water to outlying parts of the city. It would certainly be unjust to tax all the cost of such large mains to the property abutting on the street where they happen to be laid. In the wisdom of the city authorities, it might be judged prudent to lay such mains and pay for the same out of the general fund. One drawing from this main through a lateral main receives a benefit for which he is not taxed in the local improvement. One having property on the main conduit, it is true, may escape local taxation. The same may be said of one having property on a street improved out of the general fund. These are matters that

June, 1901.] Opinion of the Court—WHITE, J.

must be left to the wisdom of the municipal government. The brain and ingenuity of man have never yet been able to devise a scheme by which the burden of taxation is made to fall uniformly and equally upon all. Says Judge Cooley:

“There is no imperative requirement that taxation shall be equal. If there were, the operations of government must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just, and any combination of taxes is likely in individual cases to increase instead of diminish the inequality.” Cooley, *Taxation* (2d ed.), 164.

The contention of the appellant that because the constitution has limited the indebtedness of cities for supplying the same with water, artificial light, and sewers to five per cent. additional to the amount allowed for general indebtedness, local assessment districts cannot be created for constructing water mains, is not sound. The constitution limits the general indebtedness of cities, yet in the case of *Baker v. Seattle*, 2 Wash. 576 (27 Pac. 462), this court held that the indebtedness of local assessment districts for street improvements was not to be considered when computing the limit of municipal indebtedness. For the same reason the debts of local assessment districts for laying water mains should not be considered as having any bearing on the limit of the indebtedness of cities for water, artificial light, and sewers.

But it is urged by the appellant that, because the city may charge for the water furnished to its inhabitants, and make a profit on the same, the city is like an independent corporation furnishing the city with water, and, as it is clear that such corporation would not have the power assumed by the city in creating local districts, therefore

the city has not such power. The answer to this, is that under the laws of the state the legislature has seen fit to confer such power on the city, and there is no specific or even implied restriction imposed by the constitution against the exercise of such legislative power and discretion. *Allentown v. Henry*, 73 Pa. St. 404.

It may be that the city is not authorized to charge for water so as to make a profit. The mere fact that in reality it charges so as to make a profit in no way determines the question of its power, which is all that is involved in this case, to create a local assessment district for the purpose of laying water mains. The argument of the appellant is based on the assumption that the city has a *legal right* to make a profit by the sale of water, the same as a private water company. In view of the legislation clearly authorizing the creation of local assessment districts for laying water mains, if the right to make a profit on the water sold, and the right to create the district cannot stand together, it would be our duty, for reasons heretofore given, to hold that the making of a profit by the sale of water was the unconstitutional act, and not the creation of the local improvement district. But the question whether or not the city can charge water consumers more than the amount necessary to pay for the costs and expenses of improving and maintaining the water system and the additional cost of bringing the water to the city for distribution is not properly before us in this action. The allegation of the complaint, in substance, is that the city of Seattle charges for the water supplied by it certain fixed rates, which are in excess of the actual cost to the city, and that the city requires payment in advance. The question suggested can be raised only by one who is charged such excessive rates, or who is refused water unless he pays such excessive rates. There is no allegation in this complaint that the

June, 1901.]

Syllabus.

plaintiff is charged such excessive rates, or that he has been refused water unless he pay such excessive rates.

We hold that the city of Seattle, under its charter, the laws, and the constitution of this state, may create a local assessment district for the purpose of laying a water main; that it may charge the cost and expenses of the same according to benefits to the real property in such district benefited thereby, and that the act of the legislature authorizing the issuance and sale of bonds by cities to pay for local improvements (Session Laws 1899, p. 234), applies to the city of Seattle.

The judgment of the court below is therefore affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT, DUNBAR and HADLEY, JJ., concur.

[No. 3837. Decided June 24, 1901.]

WILLIAM A. VAN DUSEN, *Appellant*, v. DANIEL KELLEHER, *as Executor, et al., Respondents*.

MORTGAGE FORECLOSURE — EVIDENCE ADMISSIBLE UNDER ISSUES.

Where the only question in issue is the right of plaintiff to foreclose a mortgage against a decedent's estate, plaintiff cannot predicate error on the ground of the court's refusal to admit in evidence a letter from the executor, showing presentation and allowance of plaintiff's claim; nor upon the refusal to admit in evidence the order directing notice to creditors; nor upon the refusal to admit the last will and testament of deceased, as tending to show that the lands mentioned in the will were charged with the payment of plaintiff's claim.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

E. F. Harshman, J. D. Jones and Gray & Perkins, for appellant.

Bausman & Kelleher, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—The present action was commenced in May, 1896, to foreclose a mortgage given by one Michael McCauley to the plaintiff (appellant); McCauley, in his will, having appointed Daniel Kelleher executor of his estate. This complaint was a simple complaint in foreclosure, no claim being made for personal judgment. In the year 1897 an amended complaint was filed, setting up two causes of action; the first being the cause of action set forth in the original complaint, which did not allege presentation of the claim to the executor, and which did not ask for a deficiency judgment. The second cause of action set up in the amended complaint was the allegation of a lien, for the unpaid balance of the mortgage, on certain lands, by virtue of the will of the deceased. A demurrer to this second cause of action was sustained by the superior court, and said cause was dismissed from the complaint. From this judgment dismissing the second cause of action an appeal was taken to this court, and the appeal was dismissed for the reason that the requirements of the law in relation to appeals had not been complied with by the appellant. See *Van Dusen v. Kelleher*, 20 Wash. 716 (56 Pac. 35). Thereafter the plaintiff asked to file a second amended complaint, which virtually consolidated the two causes of action into one. Leave to file this amended complaint was also refused by the court. Thereafter, in 1899, an attempt was made to file a third amended complaint, and this was also rejected by the court. In May, 1900, the case was brought on for hearing, and a trial was had upon the issues stated in the first cause of action, and the only issue stated in that cause of action was the amount due on the mortgage and the right of foreclosure. It is stated by the court in the commencement of the findings of facts that the cause

June, 1901.] Opinion of the Court—DUNBAR, J.

came on for trial upon the first cause of action set forth in the amended complaint. The court rendered its judgment in favor of plaintiff, decreeing a foreclosure for the amount claimed to be due in the first cause of action. From that judgment this appeal was taken.

The appellant assigns six errors. The first is that the court refused to admit in evidence a letter, marked "Exhibit H," from the executor of deceased to the appellant, as evidence of a presentation and allowance of appellant's claim, and of estoppel against said executor to set up the statute of limitations or non-claim against appellant's cause of action. A sufficient answer to this assignment is that, under the issues presented for the consideration of the court at the trial, the testimony offered was immaterial; for it was on a subject foreign to the right of the appellant to foreclose his mortgage, which was the only question in issue. The same may be said of the second assignment, viz., the refusal of the court to admit in evidence the order directing notice to creditors; and the third, in refusing to admit in evidence the last will and testament of the deceased, as tending to show that the lands mentioned in the will were charged with the payment of appellant's claim, because, under the first cause of action stated in the complaint, no such claim was made. Neither was there any contention under the pleadings that the appellant was entitled to a personal or deficiency judgment of foreclosure, which is the fourth assignment of error. The fifth assignment, that the court erred in its conclusion that the sum of \$3,033.34 is the amount due on said note and mortgage, seems to be without force, as that is the amount conceded to be due. What we have said in relation to the third assignment is applicable to the sixth, viz., that the court erred in refusing to find that the will of the deceased created an equitable lien upon the 522 acres of land therein

mentioned. There is no claim that the court erred in refusing the amendment to the complaint, which would have put in issue the matters complained of by the assignments, which, in the main, were the matters to which a demurrer had been sustained by the court, and from which an appeal had been taken to this court and dismissed, as above noted.

The errors assigned, therefore, not falling within the issues presented by the pleadings upon which the trial was had, the judgment must be affirmed.

REAVIS, C. J., and FULLERTON, MOUNT, ANDERS, WHITE and HADLEY, JJ., concur.

[No. 3584. Decided June 25, 1901.]

ADA Y. INGRAM *et al.*, Appellants, v. GOLDEN TUNNEL MINING COMPANY *et al.*, Respondents.

TRIAL — ADMISSION OF IMMATERIAL EVIDENCE — HARMLESS ERROR.

Error of the court in admitting evidence is harmless, in an equitable cause which is triable *de novo* on appeal, unless it can be shown that the judgment is founded upon immaterial evidence and findings based thereon, or that appellant has been subjected to onerous and unnecessary costs by reason thereof, and that he has been refused relief by the trial court.

FORFEITURE — WHO MAY DECLARE — CONTRACT TO CONVEY.

Where a contract for the sale of a group of mining claims is executed by two of the three owners thereof, agreeing to execute a deed for the whole interest and deposit the same in escrow until the completion of payment of all installments of the purchase price, and placing the purchasers immediately in possession with the right to work the claims, the deposit by the purchasers of the first installment of purchase price, with instructions not to pay same over until a deed executed by all the owners should be placed in escrow with the holder of the money, would not give the two parties who contracted to sell the claims the right to declare a forfeiture of the contract, so far as the same related to their interests in the claims.

June, 1901.] Opinion of the Court—FULLERTON, J.

SAME — ENFORCEMENT — PERFORMANCE BY PARTY ASKING.

A forfeiture cannot be enforced by one party to a contract, until he shows that he has performed all of the conditions therein to be performed on his part.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Ballinger, Ronald & Battle and *A. W. Frater*, for appellants.

Milo A. Root and Piles, Donworth & Howe, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—On August 6, 1898, the appellant C. J. Ingram, together with Henry Olsen and John Anderson, were the locators and in possession of certain mining claims situated in King county, Washington, holding the same in the following proportions: Ingram an undivided three-eighths, Olsen an undivided three-eighths, and Anderson an undivided one-fourth. Olsen was at that time in the Alaskan territory. On that day, Ingram, representing his own interests and purporting to represent the interests of Olsen, together with Anderson, entered into a written contract with the respondents Gardner and Hagar for the sale to them of the mining properties. The contract, as at first executed, was as follows:

“For and in consideration of the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, and the further consideration hereinafter mentioned, we, C. J. Ingram, Jno. Anderson and Henry Olsen, the owners and proprietors of a group of mining claims known and described as follows, to-wit: Golden Tunnel, Empress, Emmett, Beaver, Stella and Blue Ribbon, and Ruby, situated in King county, state of Washington, on or near Eagle or Roaring creek, about five miles south of Salmon Siding on the Great Northern R. R., herein sell said above

described mining claims to George T. Gardner and A. W. Hagar upon the following terms, to-wit: Said George T. Gardner and A. W. Hagar to pay to said C. J. Ingram, Jno. Anderson and Henry Olsen the sum of five thousand dollars (\$5,000), five hundred dollars (\$500) on or before the sixth day of October, 1898, five hundred dollars (\$500) on or before the sixth day of December, 1898, one thousand dollars (\$1,000) on or before the fifteenth day of August, 1899, and three thousand dollars (\$3,000) on the first day of December, 1899. The said George T. Gardner and A. W. Hagar to have full possession of said mining property from and after the date hereof for the purpose of mining and shipping any and all ore they may take from said mine as well as the ore already on the dump. Said C. J. Ingram, Jno. Anderson and Henry Olsen agree to execute forthwith a deed to said mining property herein described to Geo. T. Gardner and A. W. Hagar, and deposit in escrow with the Washington National Bank of the city of Seattle, to be delivered to Geo. T. Gardner and A. W. Hagar on receipt of the full payment of five thousand dollars (\$5,000) on or before the time herein stated.

In testimony whereof, witness our hands this the sixth day of August, 1898.

C. J. INGRAM,
JOHN ANDERSON,
HENRY OLSEN, by C. J. Ingram,
Attorney in Fact."

After the contract was signed, it was delivered to Hagar, who, with a third person and Anderson, went to the mining properties for the purpose of having Anderson point out their exact locations and boundaries. Ingram at that time was living at Skykomish, and when Hagar returned from the mining properties he passed through that place. Ingram met him at the depot, and stated to him that the fact that he had signed Olsen's name to the contract had bothered him a good deal, and that he wanted it taken off. After some talk between them, Hagar erased Olsen's name from the contract in the presence of Ingram. On the day

June, 1901.] Opinion of the Court—FULLERTON, J.

the first payment named in the contract fell due, Ingram and Anderson forwarded to an agent of the Great Northern Express Company at Seattle a deed executed by them, purporting to convey the properties described in the contract to Gardner and Hagar, with instructions to deliver the same to the Washington National Bank on the payment of five-eighths of the amount of the payment then due, being the proportion coming to Anderson and himself, and the deposit of three-eighths of the amount to the credit of Olsen. The agent presented the deed to the bank twice on that day and demanded payment according to the instructions given him in the letter. No money had been deposited with the bank by Hagar and Gardner at the times the presentations were made and payment was refused. Subsequently, on the same day, Hagar and Gardner deposited the sum of five hundred dollars in the bank, with a letter of instructions authorizing the bank to pay it over when the other parties to the contract deposited a deed conveying the mining properties to them executed by Ingram, Anderson, and Olsen. The next day the agent of the express company again presented the deed and demanded payment in accordance with his original instructions. This was refused by the bank for want of authority, and the deed was returned by the agent to Ingram. At no time was a deed executed by either Ingram, Anderson, or Olsen conveying the property, or the undivided interest of either of them therein, to Gardner and Hagar, deposited with the Washington National Bank in escrow. Four days later Ingram and Anderson served a writing upon Gardner and Hagar notifying them that they had forfeited all right in and to the mining properties, and forbidding them to go upon the property, or from further interfering with any of the ore on the dump taken from the mines.

Gardner and Hagar entered into possession of the min-

ing claims immediately upon the execution of the contract, and between that time and the time the first payment fell due expended in betterments upon the property some five thousand dollars. They subsequently conveyed their interests to the respondent the Golden Tunnel Mining Company, which took possession, and has remained in possession since that time, expending thereon in betterments some fifteen thousand dollars. Subsequent to the notice given by Ingram and Anderson, the respondents settled with Anderson to his satisfaction, and separately negotiated with and purchased the interests of Olsen. They have also kept on deposit with the Washington National Bank the proportionate share of the original purchase price coming to Ingram, with instructions that it be paid to him on his executing and delivering to the bank a deed conveying his undivided three-eighths interest in the property to Gardner and Hagar. At the time of the execution of the original contract Ingram was a married man, his then wife being his co-plaintiff in this action. A divorce was subsequently had between them, the decree for which awarded to the wife one-half of the interest Ingram then held in the mining properties. They sued jointly for a recovery of the original interest, and for an accounting. The trial court found as conclusions of law:

(1) "That the plaintiffs, C. J. Ingram and Ada Y. Ingram, are entitled to a judgment against the said Gardner and Hagar for a sum equal to three-eighths of five hundred dollars (\$500), together with interest thereon at the legal rate from the 6th day of October, 1898, to the 1st day of May, 1899; for the further sum of three-eighths of five hundred dollars (\$500), together with the legal interest thereon from the 6th day of December, 1898, to the 1st day of May, 1899; for the further sum of three-eighths of one thousand dollars (\$1,000), and for the further sum of three-eighths of three thousand dollars (\$3,000), and to a decree establishing a vendor's lien upon an undi-

June, 1901.] Opinion of the Court—FULLERTON, J.

vided three-eighths of said property for the sums above mentioned, to secure the payment thereof.

(2) "That the defendant the Golden Tunnel Mining Company and Gardner and Hagar are entitled to a decree directing and requiring the plaintiff in this action, upon the payment of said sums aforesaid, to execute a good and sufficient deed to all their right, title, and interest in and to the properties described in paragraph 1 of the findings of fact herein."

A decree was entered accordingly.

The appellants assign error upon the rulings of the trial court in the admission of certain evidence, and in making findings of fact thereon, claiming that such evidence and findings are wholly immaterial to any issue in the cause. Conceding that the record does show error in this respect, it avails the appellants nothing, unless they are able to show further that they are in some way prejudiced by it. The action is one of equitable cognizance, which this court tries *de novo* upon the record. By the statute, as well as by its constitutional powers, this court is authorized in cases of this character to affirm, modify, or reverse the judgment appealed from; and it may, if it reverses the judgment, remand the cause for a new trial, or for some further proceeding, or it may direct the proper judgment to be entered. In trying the cause *de novo* this court will, of course, disregard immaterial evidence; but it will not reverse a case and remand it for a new trial because such evidence appears in the record, where the clear preponderance of the material evidence supports the judgment of the court; and much less will it in such a case direct a judgment for the other side. To make an error of this character available, the appellant must show that the judgment is founded upon immaterial evidence and findings based thereon, or that he has been subjected to onerous and unnecessary costs because of the admission of such

evidence, and that he has applied to and has been refused relief by the trial court. Neither of these contentions are made in the present case, and we do not feel called upon to follow the appellants into a discussion of the admissibility or non-admissibility of the evidence complained of.

The principal contention of the appellants is that the respondents Gardner and Hagar subjected the rights they acquired in the mining properties by the contract of sale to forfeiture at the option of either Ingram or Anderson by depositing the first installment of the purchase price subject to the condition that it be paid over only when a deed executed by Ingram, Anderson, and Olsen to Gardner and Hagar should be deposited in escrow with the bank, and that such forfeiture became absolute when Ingram and Anderson notified them that they would not accept the conditions. It is argued that the contract itself only purports to affect the interests of Ingram and Anderson, that the negotiations between the parties appearing in the evidence shows that it was not the intention of either Ingram or Anderson to convey or procure the conveyance of Olsen's interest, and that Gardner and Hagar understood that only the interests of Ingram and Anderson were included in the contract of sale. We cannot agree with the appellants either in their construction of the contract or their interpretation of the evidence. The contract, as originally executed, purported to sell the entire interests for a definite and fixed price, payable in installments of specific sums, without regard to the several individual interests, and was signed in an apparently legal manner by all of the parties. True, Ingram afterwards caused Olsen's name to be erased; but this, it would seem from his own statements, was not because he thought there was any lack of power on his part to bargain away Olsen's interest, but was rather because he thought he had com-

June, 1901.] Opinion of the Court—FULLERTON, J.

mitted some criminal offense by signing Olsen's name to a writing without written authority so to do. His subsequent conduct also shows that he expected to procure Olsen's signature to a deed. In the letter of instructions to the express agent, which was prepared by him, the requirement that Olsen's share of the purchase price be deposited in the bank, was explained as follows: "This is necessary on account of our being unable to get Olsen's signature to the deed, which Messrs. Gardner and Hagar understand," showing that it was then his understanding that it was the duty of himself and Anderson to procure a conveyance from Olsen, and not the duty of Gardner and Hagar. Anderson also testifies that this was the understanding of the parties. The trial judge, it is true, caused it to be specially entered in the record that Anderson's testimony was unsatisfactory, and that he would not believe him where he was uncorroborated; yet, taken in connection with the actions and admissions of Ingram and the testimony on the part of the plaintiffs, we cannot say that the court's conclusion that there was no forfeiture on the part of Gardner and Hagar of the terms of the contract is not supported by a preponderance of the evidence.

But, if we accept the appellant's theory, and treat the contract as an agreement to convey the interests of Ingram and Anderson only, no forfeiture could have been declared at the time it was attempted by Ingram and Anderson. By the terms of the agreement they were obligated to execute and deposit in escrow with the Washington National Bank of Seattle a deed conveying the properties to Gardner and Hagar. This they had not done at that time, nor have they since done so. Furthermore, in tendering the deed to the bank they attached to its delivery the condition that Olsen's share of the purchase price be deposited with the bank. The first was a condition precedent, to be performed

by them before they were entitled to any installment of the purchase price; and the second was the attempt to exact a condition the contract, if their version of it be the correct one, did not authorize them to exact. Before a forfeiture can be enforced by one party to a contract, he must show that he has performed all of the conditions of the contract on his part to be performed. He cannot complain of the other party so long as he himself is in default. Counsel for the appellants in their brief say that these are circumstances wholly trivial, that a substantial compliance is all that is required, and that the sellers did substantially comply. But counsel seemingly overlook the fact that they are asking the court to deprive the respondents of the advantages accruing to them by virtue of the terms of the contract, not because they have not performed its terms, but because they did not perform in time. Forfeitures are never favored, and under the rules of the common law a forfeiture would not be declared unless the complaining party was able to show that he had performed his part of the contract strictly, and somewhat trivial omissions were seized upon to escape the necessity of declaring a forfeiture when to do so would result in a gross injustice to the other party. However, we cannot think the omissions to comply with the terms of the contract in this case were so trivial as counsel would have us believe. There are many reasons, not necessary to recite, but which readily occur to the mind, why the purchasers would wish the deed deposited before the money was paid over; and the requirement that Olsen's share of the money be deposited was a wholly gratuitous exaction, entirely foreign to any right which the appellants could claim in view of the contract they are now seeking to enforce, and one which would deprive the respondents of the use of a large sum of money without even the semblance of benefit to them. From any view of

June, 1901.] Opinion of the Court—REAVIS, C. J.

the case, neither Ingram nor Anderson were entitled to declare a forfeiture of the contract at the time they attempted to declare it.

The judgment of the trial court was, therefore, as favorable to the appellants as they had the right to demand, and the judgment of this court is that it stand affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3683. Decided June 25, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. P. J. CONCANNON, *Appellant*.

CRIMINAL LAW — GRAND LARCENY — EVIDENCE.

In a prosecution for grand larceny, in which the evidence of an accomplice has been admitted showing that the stolen goods were put in a sack and placed under a table in a room of defendant's house, it is admissible to interrogate witnesses who had been in the room at the time the stolen goods were said to be there whether they had seen either the goods or a sack in the room.

SAME — ACCOMPLICES — UNCORROBORATED TESTIMONY.

A verdict of guilty in a criminal prosecution is unwarranted when based upon the evidence of an accomplice who was addicted to the habitual use of opium, and under its influence while testifying, when such evidence is uncorroborated upon any material matters.

Appeal from Superior Court, Pierce County.—Hon. W. H. H. KEAN, Judge. Reversed.

John F. Dore, A. R. Titlow and Hugh Farley, for appellant.

Fremont Campbell, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

REAVIS, C. J.—Defendant was convicted of the crime of grand larceny. The information charged him with

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125	422
25	327
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37	415

taking and assisting in taking, stealing, and carrying away certain musical instruments, all of the value of \$350, the property of A. A. Tayler. The principal witness at the trial was J. P. Dunlap, an accomplice. The evidence produced by the state was substantially as follows: On about the 17th of September, 1898, late at night or early in the morning, the music store of A. A. Tayler & Co., situated on C street in Tacoma, was entered by the witness Dunlap, who made the entry by unlocking the door with a key then in his possession; that he remained several hours in the building, and took the musical instruments described in the information, and carried them away. Dunlap testified with particularity as to the manner in which he entered the store and took the instruments, and that he was aided and assisted by the defendant. The defendant had been connected with the city police of Tacoma as a detective for some years. In March, 1898, as a police officer, he had arrested Dunlap for having burglarious instruments in his possession, and had frequently come in contact with Dunlap, who was then known to the police as "Dun." At that time and previously Dunlap, under the name of Dun, was known to the police as an habitual criminal. The larger portion of his time since youth had been spent in the penitentiary, he having served four terms for felonies, including larcenies. He was frequently shadowed by the city detectives, and particularly by Concannon. He was sometimes used to procure information relative to crimes committed by other suspects. During the summer preceding the stealing of the musical instruments, the defendant's connection with the city police was severed, and he opened an office in the city as a private detective. Dunlap testifies that thereafter defendant proposed to him that Dunlap should enter the music store, take the musical instruments and secrete them, and that defendant would then, in the

capacity of detective, negotiate with the owner of the stolen goods for their return, secure a reward therefor, and divide the proceeds with Dunlap; that the reason assigned by defendant for the commission of the crime was to assist in establishing defendant's reputation as a detective in the business community. A number of conferences between himself and defendant relative to the larceny are detailed by the witness, in which he states that defendant procured and gave to witness the key with which he opened the door of the music store. Written notes were produced by the witness, which he stated had come from defendant during the pendency of the agreement between them to steal the musical instruments, and at great length the witness detailed many conferences and meetings relative to the larceny and in pursuance of the agreement; that defendant was present, though outside, and on the street, when the larceny was committed; that some of the musical instruments in a sack were taken by himself and defendant to defendant's home, which was a small hotel; that these instruments were placed in the dining room early on the morning of the 18th of September, which was Sunday; that witness secreted the other instruments in an old building, and also, on the same Sunday, took those which had been carried to defendant's place away from there, and secreted them with the others; that defendant told witness thereafter that he was negotiating with Tayler, the owner, for the return of the goods, but that such negotiations were unsuccessful, as Tayler would not pay sufficient reward for their return. It seems that thereafter the witness was charged with the larceny, though sentence had not been passed upon him at the time of the trial. Dunlap stated he was to be leniently dealt with because of his testimony given at the trial of defendant. He also testified that since about 1883 he had been habitually using opium in large

quantities. During the trial, and while he was testifying, which occupied several days, opium was regularly administered to him; he could not proceed without the drug. The state also produced Mary Dunlap, the wife, who testified that she had been the wife of J. P. Dunlap for some two years. She had also been arrested at one time by the defendant, in connection with her husband. She was, and had been for a long time, an habitual user of narcotics, both chloral and opium, and at times during her examination declared herself bordering on hysteria. She testified that she knew of the intended larceny of the musical instruments; that during that time she heard detached portions of conversations between her husband and defendant; that she saw a key, which defendant gave to her husband; that she heard mention made of a music store. She could not identify any key. On cross examination she frequently, under her privilege, declined to answer questions that might be incriminating. Mr. Tayler, the owner of the musical instruments stolen, testified to the circumstances attending the larceny; also that thereafter the defendant came to his store and presented his card as detective and offered to undertake their recovery for a reward of \$100; and that they had several conversations in regard to it; that defendant, in the early part of their negotiations, stated that he would restore the goods and arrest the parties, or ask no compensation. They did not agree upon the terms, and defendant did not undertake the recovery of the goods for Mr. Tayler. There were other circumstances introduced by the state, through various witnesses, which are of no considerable importance,—such as evidence relating to a young lady, an acquaintance of defendant and one who conferred with him somewhat in the detective business, having been with a clerk of Tayler and his sister in recreation at a summer camp, where the young lady had the

June, 1901.] Opinion of the Court—REAVIS, C. J.

opportunity of access to the clerk's valise, in which a key to the music store was left; and perhaps the intention of this evidence was to suggest that a wax impression could have been taken of this key, which furnished the model for the key that unlocked the music store, and which Dunlap had testified to. But such evidence is mentioned only to illustrate that many of the circumstances and incidents related by various witnesses for the state were only suggestive of suspicion or opportunity of the defendant. After the trial was concluded, and a verdict of guilty returned against the defendant, and immediately after the motion for a new trial was overruled, but before sentence, the witness J. P. Dunlap, who was then in the county jail, and had been for a long time prior thereto, under conviction of this larceny, and charged with other offenses, informed the sheriff that he desired to make a statement of the truth in regard to the testimony he had given at the trial, and the sheriff informed counsel for the defendant of Dunlap's request. Counsel came to the jail, and there Dunlap, in the presence of the sheriff, and afterwards to others who are mentioned, made the statement, in substance, that he was ready to go into court and testify to the motives that induced him to testify in the trial, and that he would make it so plain that his statement would be obvious. Dunlap was then informed that sentence would be passed upon defendant the same day. He thereupon requested that the court be advised that he would testify that the defendant, Concannon, had nothing whatever to do with the Tayler robbery. The sheriff stated that no inducement or suggestion had been made to Dunlap to procure any statement from him; that again on the following day, and after the county physician had prescribed the necessary opium for Dunlap, and in the afternoon, the wife of Dunlap, who was also a witness at the trial, called to see her

husband, and Dunlap said to his wife, in the presence of the sheriff: "I am going to make a clean breast of it, and tell the whole truth and exonerate Concannon"; and the wife responded: "Think it all over before you do it." On a subsequent day Dunlap said, in the presence of counsel and the sheriff, that he was too weak to make out his statement then, and he had some misgivings whether the authorities would not punish him for perjury; that again some days subsequently, when the wife was with Dunlap, and in the presence of the sheriff, the wife said to the sheriff in Dunlap's presence, referring to her husband: "He will make the statement which he said he would make, and he will make it fuller and stronger than he told you;" and Dunlap answered: "Yes; I am only a thief; but even thieves have honor; and I don't care if they give me the full term of the law. I will come out with the whole truth, and I will make my statement tomorrow, and show how this job was put up against Concannon. I will have it ready by tomorrow evening." Dunlap reiterated this statement to several other persons voluntarily, but afterwards stated that he would not make the statement until after his trial and sentence, when he would make a full and complete one entirely exonerating the defendant. In this abstract of the evidence on the part of the state no mention has been made of that produced by the defendant. It may be passed with the suggestion that it absolutely contradicted all the material evidence for the state.

1. A number of errors have been assigned by counsel for defendant, but they are not of sufficient moment to require attention in detail. The trial was a tedious one, some irritation of temper was exhibited by counsel, and perhaps the court was not unruffled during its course. We are not sure but remarks complained of by counsel on the part of the court were justified by the over-zeal shown by

June, 1901.] Opinion of the Court—REAVIS, C. J.

counsel. When counsel have the opportunity to present objections, they must not persist in argument after the court has ruled. It does not appear that the court commented upon the testimony, or stated an opinion as to the credibility of witnesses, and any inadvertent observations were fully explained in the advice afterwards given to the jury relative to its function in determining the facts. Relative to questions propounded by counsel for defendant to witnesses who, on the day mentioned, saw the diningroom in which Dunlap said some of the musical instruments were placed by himself and the defendant, as to whether they saw certain instruments or a sack, and to which objection was sustained, it is appropriate to mention that we see no good reason why the questions should not have been allowed. Dunlap had testified specifically to certain musical instruments that were placed in this room and under a table, and it would seem that the questions were not leading, which merely directed the witnesses directly to the fact. No substantial error is perceived in the instructions. Those tendered by counsel for defendant which expressed the law, were, in substance, given to the jury, and the whole tenor of the instructions was fair.

2. The seventh instruction given was in the following language:

“In regard to the testimony of the witness Jos. Dunlap, who the court instructs you is an accomplice, the court instructs you that, while it is a rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice or accomplices, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, you are satisfied beyond all reasonable doubt of its truth and that you can safely rely upon it.”

This court has not had before it an instruction in this form stating the rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice. In the case of *Edwards v. State*, 2 Wash. 291 (26 Pac. 258), the superior court instructed the jury "that to convict one charged with crime upon the testimony of an accomplice, the accomplice must be corroborated in some material matter tending to show the accused to have been implicated in the commission of the crime;" and it was substantially said of that instruction that, under the testimony, it was correct, though, upon review of the case here, it was determined there was no material corroboration, and it was observed:

"As to the other point, it is true that we have no statute requiring the corroboration of an accomplice, such as is found in a few of the states. It is also true that at common law conviction upon the unsupported testimony of an accomplice was upheld to the extent, at least, that, although the higher courts and law writers laid it down that a trial court ought to advise the jury not to convict on such testimony, it was not reversible, even if they did not so advise. Yet the books are full of cases from courts not bound by any statute, both in England and America, where corroboration has been held necessary. 1 Amer. & Eng. Enc. Law, tit. 'Accessory.' § 18, p. 74. Cases are rare, indeed, where, if the prosecutor has the assistance of a willing accomplice, no corroborative testimony can be produced. In practice it is almost invariably attempted, and juries are told, as in this case, that unless there is corroboration they should acquit. Perhaps the true view of the matter is that in many, if not in most cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt, and that it is clearly insufficient to authorize a verdict of guilty. But there may occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible

June, 1901.] Opinion of the Court—REAVIS, C. J.

it could be satisfied from human testimony; and in such cases justice demands that the evidence be accepted, so far as the court is concerned. *Collins v. People*, 98 Ill. 584. The testimony of George Rose was not of the latter class, and the court below did right to charge the jury not to convict without corroboration."

A close scrutiny of all the evidence introduced by the state does not show substantial corroboration of the accomplice Dunlap's testimony in any material fact connecting the defendant directly with the crime committed by Dunlap. The statements of some apparently pertinent facts are frequently from utterly discredited sources. Something of a light backward is thrown upon the credibility of the accomplice by his statements, subsequent to the trial, to the sheriff and other persons, which cannot be ignored when viewed in connection with the other circumstances surrounding his credibility, under the principle stated in *Edwards v. State, supra*; that is, it is not one of those cases where, from all the circumstances, the honest judgment will be thoroughly satisfied by the evidence of the accomplice of the guilt of the defendant. The habitual use of opium, as shown, by Dunlap, is known to utterly deprave the victim of its use and render him unworthy of belief. This, it is true, is primarily a question of his credibility which the jury may determine, but it is within the discretion of the superior court, when the appearance and action of the witness may show him to be under the influence to such a degree as to be incapable of honest and intelligent conception of what he is testifying to, to exclude him from testifying while in such condition. Apparently the trial court did not consider that the witness had reached this stage of untrustworthiness, and a court of review has not equal opportunity to see the witness, and will rarely interfere with such discretion exercised at the trial. Much that has been said of the credibility of the

witness J. P. Dunlap may also be applied to Mary Dunlap.

But, in the weight given to the corroborating testimony of the accomplice, we conclude that this case should fall under the rule stated in *Edwards v. State, supra*, and the judgment is reversed and the cause remanded for a new trial.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

WHITE, J., concurs in the result.

[No. 3930. Decided June 25, 1901.]

MARY KOONTZ, *Respondent*, v. R. A. KOONTZ, *Appellant*.

TRIAL — CROSS-EXAMINATION — INTERRUPTION BY COURT.

The interruption by the court of a cross-examination cannot be alleged as error, when there is no showing that the court refused to allow counsel to proceed therewith, or that exception was taken by counsel to the action of the court in that regard.

MODIFICATION OF JUDGMENT — PROCEDURE — WAIVER OF INFORMALITY.

Objection cannot be urged on appeal that an application for the modification of a judgment was made upon motion and affidavits, where the parties in effect treated the motion and affidavits of plaintiff as a petition for modification and defendant's affidavit as an answer thereto, and testimony was taken by both parties on the facts thus presented, without any objection being raised at the time.

DIVORCE — CUSTODY OF MINOR CHILD — MODIFICATION OF DECREE.

A court may modify its decree awarding the custody of an infant child, made in a divorce proceeding, although the time for appeal has expired, when it is shown that new circumstances and conditions have arisen which require a modified decree to meet the new conditions.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Gleeson & Stayt, for appellant.

Merritt & Merritt, for respondent.

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26	125
25	336
37	423
25	336
40	130

June, 1901.] Opinion of the Court—WHITE, J.

The opinion of the court was delivered by

WHITE, J.—On February 21, 1900, the respondent filed her complaint for a divorce from the appellant. Subsequently the pleadings were settled, and the case was tried before Judge Godman, sitting for the trial of causes in Spokane county at the request of the resident judges of said court, and, after a trial extending over a period of six days, the presiding judge made his findings and rendered a decree in favor of respondent. Concerning the custody of Paul Newton Koontz, the minor child of plaintiff and defendant, the court made the following findings: "That both plaintiff and defendant are fit and proper persons to have the care and custody of said minor child." As a conclusion of law the trial court found as follows: "That both plaintiff and defendant are entitled to the care and custody of the minor child, Paul Newton Koontz, each for a reasonable portion of the time, to be fixed by the court in the decree, subject to modification on application of either party showing and establishing cause therefor." Concerning the care, custody, and control of said minor child, the decree of the trial court contained the following provisions: "That the care, custody, and control of the minor child, Paul Newton Koontz, be, and the same is hereby, awarded to the plaintiff, subject, however, to the right, which is hereby given the defendant, to have the care, custody, and control of said minor child from the tenth to the twentieth day of each month, inclusive, and in exercising said right he may remove and keep said child at his own home, returning the child to the home of the plaintiff at the expiration of the said period. It is further provided that, if said child should be sick, and by reason thereof it should be unsafe for said child to be taken from the care and custody of the mother, the defendant shall not be permitted to have said child, but

shall have the right to visit the said child at the home of the plaintiff or elsewhere, when said child shall be sick, at any time, whether within the aforesaid period or not; and if said child shall become sick while in the custody of the defendant, the defendant shall return him to the plaintiff, if the health of said child will permit;" that the defendant should not have the custody of the child except during the period provided for in the decree; and "that all the provisions herein as to the custody, care, and control are subject to modification." The above mentioned decree was filed July 3, 1900, and was not appealed from by either party thereto, and the parties acted under and in accordance with said decree until January, 1901, when the respondent herein filed a motion in said superior court, asking that the decree of the trial court be modified so that she be given the care, custody, and control of the minor child all the time, to the exclusion of appellant. With this motion were filed the affidavits of the respondent and H. W. Bonne and Dr. J. E. Bitner. A counter affidavit was filed by appellant, and upon said motion the cause proceeded to trial before the Honorable George W. Belt, judge of the equity department of said court. The affidavit of the respondent in part is as follows:

"That the said defendant, on the 10th day of July, 1900, under said order, took said child from the possession of this affiant and removed said child to the city of Spokane, for a period of ten days, and returned said child to this affiant on the 20th day of July, 1900; that on the 10th day of August, 1900, said defendant removed said child from the town of Sprague, from the possession of this affiant, to Spokane, and kept said child in said city for a period of ten days, and returned him to this affiant on the 20th day of said month; and that during the months of September, October and November, said defendant removed said child from the possession of this affiant, as aforesaid, for a period of ten days during each month.

June, 1901.]

Opinion of the Court—WHITE, J.

Affiant further says that during each of the months above named, when the said defendant returned the said child to this affiant, he returned him in the middle of the night, namely, from 10 o'clock midnight to 4 o'clock in the morning; that trains were running regularly in the day time between Spokane and Sprague; and that defendant could and should have returned said child in the day time, but, instead thereof, he brought the said child from Spokane to Sprague as aforesaid, in the middle of the night; that the rest of said child was thereby broken, and the health of said child has thereby become impaired, so that on October 21, 1900, when the said defendant returned the said child to this affiant, the said child became sick from exposure and indigestion, and this affiant was compelled to and did employ Dr. Bitner, of Sprague, to attend professionally upon the said child, the said child being very sick from fever and indigestion; and affiant avers that said sickness was caused solely by reason of the fact of exposure and neglect to properly care for said child by said defendant, and because the said defendant had given the said child candy, nuts, Saratoga chips, and stuff of that kind, which did not agree with said child. Affiant further avers that the custody of said child being taken from this affiant, as aforesaid, renders the said child peevish, fretful, and is not good for the health of said child, and that the change of custody and of food is not beneficial to said child, but, on the other hand, is dangerous to the health of said child. Affiant further avers that the said child will be two and a half years old on the 24th day of December, 1900, and that if the said child is permitted to be taken backwards and forwards from the plaintiff to the defendant, to remain ten days with the defendant and twenty days with this affiant, that its manners and health will be impaired."

The affidavits of Bonne and Bitner were to the effect that the child became sick, Dr. Bitner affirming that the sickness was quite severe, from being overfed, or having eaten something which he could not digest, or from exposure in the night air, and that it was dangerous to the

health of the child to be taken from Sprague to the city of Spokane for a period of ten days during each month; that, if the practice is continued, the health of the child and the physical condition thereof will be greatly injured and impaired. The appellant filed an answering affidavit, denying the facts set up in respondent's affidavits. When the motion came on to be heard, appellant and respondent both being represented by attorneys, the court ruled that the application to modify the decree could not be heard on affidavits. The respondent then, by her attorneys, stated the grounds for her motion as follows: "The principal ground for the change of the decree is that it is detrimental to the child and detrimental to its health." Thereupon, without any objection on the part of the appellant, Mrs. Koontz was sworn and proceeded to give her testimony in support of the motion. She was cross-examined by appellant's attorney on all the facts testified to by her in chief. Her testimony tended to sustain the allegations in her affidavit and the grounds stated by her attorney for a change in the decree. Before appellant's attorney had formally announced that he had finished his cross-examination, the following took place:

"The Court: Mr. Craven, do you claim that Mrs. Koontz has been wanting in care, or has mistreated the child?"

Mr. Craven: No, sir.

The Court: Let us admit, then, that Mr. Koontz has not mistreated the child. I don't think Mr. Koontz would do that; but in this case the court must consider the welfare of the child without regard to the wishes of the parents, and I think it is atrocious that a child of tender years, like this one, should be taken away from its mother 10 days in the month, or at all. Without intending any criticism on Judge Godman, I think the mother should have the constant care of a child of this age. I think the decree should be modified.

June, 1901.]

Opinion of the Court—WHITE, J.

Mr. Buck: Do you think that, in spite of the fact that the other party, the father, or those with whom the child is kept, where they are competent persons, and the child itself is equally satisfied with being there as anywhere else?

The Court: Yes, I am assuming that Mr. Koontz has not mistreated it while he had charge of it, and that he took reasonable care of it; but I have raised children enough myself to know that a child of this age should not be taken from its mother.

Mr. Buck: Suppose the mother is a very nervous person, and the child gets its nervousness from its mother—

The Court: I am assuming that Mrs. Koontz is a proper person to have the custody of the child.

Mr. Merritt: I will suggest this, that Judge Godman found that both of the parties were competent persons to have the care of the child.

The Court: I don't doubt that at all. If this child were older, then it would be a different question; but I think a child of this age should be with its mother. I would not deprive the father of visiting it at proper times.

Mr. Merritt: We have no objection for the order to provide for the father to visit the child at any time he desires, in the proper manner, and at proper hours.

The Court: I don't believe the child's health can be kept good in changing around like that every month. It is liable to injure it. When the child gets older, so it can be taken back, the decree can be modified again. I think at this time the mother should have it all the time.

Mr. Merritt: I will prepare an order and submit it."

Mr. Craven, counsel for the appellant, stated that the appellant did not want to be put in a position of consenting to a modification of the decree, and would, therefore, make no suggestion as to the privilege to be given the appellant to visit the child. The record then discloses the following:

"Mr. Merritt: I will put in the decree that you may visit the child at any time and place you may desire.

Mr. Buck: We don't want to be put in the position of consenting to that. We desire an exception to the ruling of the court."

This exception was the only one taken, and it was to the ruling of the court modifying the decree. The decree was modified as follows:

“That the care, custody, and control of the minor child, Paul Newton Koontz, be, and the same is hereby, awarded to the plaintiff, subject, however, to the right, which is hereby given the defendant, to visit said child at the home of the plaintiff at any and all proper times, and under any and all proper circumstances.”

There is nothing in the record to show that the court refused to permit counsel for appellant to proceed with the cross-examination of respondent. Even if the interruption of the court can be construed as such refusal, there was no exception taken. Appellant's counsel did not ask or attempt to continue the cross-examination of the respondent. The appellant did not present any witness or offer any testimony in his own behalf. He did not claim that respondent was an unfit person to have the child, but expressly admitted that she was not wanting in care, and had not mistreated the child. *The health of the child was the moving consideration for the change in the decree.* It had been demonstrated to the court that the order made in the first instance should not be adhered to, because the child had become sick, and the evidence tended to show that the frequent changes caused the sickness. In presenting the case to the court, the better practice would have been to have set forth the reasons in the motion, or to have filed with it a petition stating the facts relied upon for a change in the original decree, and on this issues might have been joined. The parties themselves have treated the motion and affidavits of respondent and the reply affidavit of appellant as such petition and answer thereto, and testimony has been taken on the facts thus presented, and appellant should not now be heard to complain as to the informal manner in which the facts were

June, 1901.]

Opinion of the Court—WHITE, J.

presented to the court, especially as he made no objection to hearing the motion on its merits by oral testimony.

It is claimed by the appellant that the court erred in modifying its own judgment after the time of appeal had expired. The appellant states the law correctly in his brief when he says that, "a decree of the superior court, which determines the custody of infant children, from which no appeal has been taken, is conclusive upon the court which rendered the decree and upon all other courts, in the absence of a material change in the condition and fitness of the parties, *or the requirements for the welfare of the child.*" *Dubois v. Johnson*, 96 Ind. 6. When the decree was rendered the court did not know, and it was not foreseen, that the frequent changes in the custody of the child would affect its health and disposition. When this fact was shown by *subsequent* events, it was the duty of the court, in the interest of the child, to change its decree. The case of *Reid v. Reid*, 74 Iowa, 681 (39 N. W. 102), cited by appellant, holds that the decree is *res adjudicata* as to all matters before the court, and can be modified only upon a showing of *new circumstances and conditions* which require a modified decree to meet the new conditions. The new circumstance and condition in this case was the changed condition in the health of the child, which arose after the original decree, and could not have been foreseen.

We think the court below, under these circumstances, exercised a wise discretion in the interest of the child in changing the decree. For that reason the judgment of the court is affirmed.

REAVIS, C. J., and FULLERTON, DUNBAR, ANDERS and HADLEY, JJ., concur.

MOUNT, J., not sitting.

[No. 3601. Decided June 26, 1901.]

GROVELAND IMPROVEMENT COMPANY (*H. M. Fisher, substituted*), Appellant, v. FARMERS' SUPPLY COMPANY, Respondent.

CONVERSION — EVIDENCE.

In an action by a corporation for the conversion of a quantity of hay, where a lease by plaintiff to defendant of the lands upon which the hay was grown was put in evidence by the latter, plaintiff is entitled, on rebuttal, to show that the officers executing the lease had intruded into office and had acted without authority, and that that fact was known to defendant when it accepted the lease.

CORPORATIONS — INVALID CONTRACTS — RATIFICATION BY RECEIVER.

The acceptance by the receiver of a corporation of rents reserved under an invalid lease which had been executed by intruders into the corporate offices, does not amount to a ratification, where the receiver had no knowledge of all the material facts and circumstances surrounding the lease.

Appeal from Superior Court, Clallam County.—Hon. JAMES G. McCLINTON, Judge. Reversed.

A. W. Buddress and *George C. Hatch*, for appellant.

Trumbull & Trumbull, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This was an action of conversion, originally begun by the Groveland Improvement Company, a corporation, as plaintiff, against the respondent, to recover the value of a certain quantity of hay which it alleged the respondent had unlawfully taken and carried away to the damage of the plaintiff. The complaint was in the usual form. The answer was a general denial. After issue joined, one H. M. Fisher was appointed receiver of the plaintiff corporation, and was thereafter substituted as

plaintiff. On the trial of the action, after the appellant had introduced evidence tending to prove a *prima facie* case, the respondent introduced in evidence a written lease, purported to have been executed by the Groveland Improvement Company to the respondent, leasing to it certain lands for a term of eleven months; also evidence showing that the hay in controversy had been grown upon the leased lands during the term of the lease, and that it was a part of the income from the property, which inured to it by the conditions of the lease. It also showed that the receiver, subsequent to his appointment, had received from respondent a part of the rental reserved by the terms of lease. In rebuttal the appellant offered evidence tending to show that the respondent had taken possession of the leased lands over the protest of the duly elected officers of the Groveland Improvement Company, who had authority to manage its affairs and transact its business; that the lease upon which the respondent relied was executed by persons who had without lawful right, and by force and fraud, intruded themselves into the offices of that corporation and usurped the functions of its lawful officers, and that the respondent's manager was one of such persons; that these persons had been ousted from the offices they had usurped by the judgment of the court, and that proceedings therefor had been begun and notice thereof served upon the respondent's manager prior to the time of the purported execution of the lease; and, further, that the rental paid to the receiver was received by him without knowledge that the present action was pending, or that there was a dispute as to the respondent's rights under the lease. The trial court refused to permit this evidence to go to the jury, whereupon the appellant rested. The court then entered an order discharging the jury, and directed judgment for the respondent.

In our opinion, the trial court erred in rejecting the evidence proffered in rebuttal. If it be true that the lease upon which the respondent relied was executed in the name of the Groveland Improvement Company by persons who had unlawfully intruded into its offices, and the respondent had knowledge of that fact when it accepted the lease, such lease would afford it no protection; it would be a mere trespasser upon the lands described in the lease, and liable to the appellant for the value of the hay which it took and converted to its own use. The rule that third persons dealing with *de facto* officers of a corporation are protected in such dealings has no application. The rule is designed for the protection of innocent third persons, who have dealt with such officers without knowledge of their true character. But here the evidence offered tended to show that the manager of the respondent, who represented it in the making of the lease, was one of the persons intruding into the offices of the corporation which purported to execute the lease; and, as he had knowledge of the lack of authority of the intruders to represent the corporation, his knowledge must be imputed to the respondent.

Nor did the acceptance by the receiver of a part of the rental reserved in the lease amount to a ratification. Aside from his lack of power to ratify it without the consent of the court appointing him, knowledge of all the material facts and circumstances is essential to an effective ratification. This the appellant offered to show the receiver did not have.

The judgment appealed from is reversed and the cause remanded for a new trial.

REAVIS, C. J., and DUNBAR, ANDERS and WHITE, JJ., concur.

June, 1901.] Opinion of the Court—REAVIS, C. J.

[No. 3606. Decided June 26, 1901.]

25 347
36 443

THE STATE OF WASHINGTON, *Respondent*, v. STEVE LYTS,
Appellant.

CRIMINAL LAW — CHANGE OF VENUE — AMENDMENT OF INFORMATION.

Under Bal. Code, § 4860, which provides that the court to which a change of venue is taken has the same jurisdiction over the action transferred as if it had been originally commenced therein, an information is amendable by the prosecuting attorney, on leave of the court of another county to which the prosecution had been transferred.

CONFESSIONS — STATEMENTS MADE ON PRELIMINARY EXAMINATION — ADMISSIBILITY IN EVIDENCE.

Testimony of the accused, amounting to a voluntary confession, given on his preliminary examination, may be introduced in evidence on his trial, under our statute (Bal. Code, § 6942), which provides that such confession may be given as evidence against the accused, "except when made under the influence of fear produced by threats."

Appeal from Superior Court, Snohomish County.—
Hon. FRANK T. REID, Judge. Affirmed.

John F. Dore, John W. Kelley and James J. McCafferty, for appellant.

James F. McElroy, Prosecuting Attorney, *W. P. Bell, G. Meade Emory and William C. Keith*, for the State.

The opinion of the court was delivered by

REAVIS, C. J.—In the early morning of the 5th of July, 1899, one Miller, then drinking with the appellant, Lyts, and defendant Esplin in the Reception Saloon, in Seattle, and waited upon by the bar keeper, Phillips, was given a drug in a glass of beer, and became unconscious, and while in that condition the bar keeper, Phillips, found \$380 in an inside pocket upon Miller, unbuttoned the vest and took the money. A quarrel ensued be-

tween the three,—Phillips, Lyts, and Esplin,—as to the distribution of the stolen money, and Miller, aroused by the quarrel and seeing his money gone, drew his pistol and demanded its return. The attention of the three was then directed to Miller, Phillips took the pistol from him, and Esplin knocked him down. Miller at once reported the theft to the police officers, and all three of them were thereafter informed against for larceny. An information was filed in the superior court against Phillips, and another against Lyts and Esplin, charging each with grand larceny. Lyts and Phillips each secured a change of venue from King to Snohomish county, for trial. In the original information filed against Lyts the \$380 was described as lawful money of the United States. Afterwards it was learned that the money consisted of three \$100 Canadian bills and \$80 in the money of the United States. After removal of the case to Snohomish county, the prosecuting attorney of King county asked leave to amend the information against Lyts, and to file a new one, so amended, describing the money correctly, and the court permitted the filing of such information, upon which the defendants were tried.

A number of errors are assigned by counsel for appellant. They have all been examined, and none are deemed reversible. After the change of venue from King to Snohomish county, the superior court of Snohomish county was possessed of complete jurisdiction of the cause. When the information was amended the action was not dismissed. 1 Bishop, New Criminal Procedure, § 714, says:

“An information differs from an indictment. Since the prosecuting officer, unlike the grand jury, is always present in court, he may on leave amend it to any extent not interfering with the due order of judicial proceedings.”

Section 4860, Bal. Code, declares:

“The court to which an action or proceeding is trans-

June, 1901.]

Syllabus.

ferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein."

On the day of the larceny the appellant fully stated the circumstances to the sheriff and deputy sheriff. Objection is made to the introduction of testimony given by the appellant and defendant Esplin at the preliminary examination, but it was shown that this testimony was voluntarily given. The following rule with reference to this is stated in 6 Am. & Eng. Enc. Law (2d ed.), p. 564: "If the confession is voluntary it will be admissible though it appears that the prisoner was not warned," where there is no statute on the subject. Our statute (Bal. Code, § 6942) substantially provides that a confession other than under the influence of fear may be given, with the circumstances attending it. In the light of the record before us, we cannot see any error here.

Neither is there observed any statement of the facts and comments thereon by the trial court within the inhibition of the constitutional rule. The court, while rather prolix in its instructions, only endeavored to direct the jury to the issues of fact before it.

The evidence abundantly showing the guilt of the defendant, and, no material error of law occurring in the trial, the judgment is affirmed.

DUNBAR, ANDERS, FULLERTON and WHITE, JJ., concur.

[No. 3931. Decided June 26, 1901.]

C. S. KALB, as Guardian, Appellant, v. GERMAN SAVINGS
AND LOAN SOCIETY *et al.*, Respondents.

JUDGMENTS — COLLATERAL ATTACK.

An action by a minor seeking to have himself decreed a tenant in common of certain real estate, in which he attacks the

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28	800
28	305
25	349
32	175
25	349
34	120
25	349
36	106
25	349
41	335

validity of a prior judgment in an action to quiet title which decreed he had no interest therein, is a collateral attack upon such prior judgment.

SAME — ADMISSIBILITY OF EVIDENCE.

In a collateral attack upon a judgment against a minor, evidence that no notice of the time or place of trial was given to his guardian *ad litem*, although admissible in a direct attack, is not competent to oust the court of jurisdiction and invalidate its judgment rendered in the prior action.

SUMMONS — SUFFICIENCY.

Under Laws 1887-88, p. 24, which provides that civil actions may be commenced by filing a complaint and issuing a summons, and that, if the action be against a minor under the age of fourteen years, such summons shall be served by delivering a copy thereof to such minor personally, and also to his father, mother or guardian, etc., a service upon the mother of the minor defendant, although she was not a party to the action, directed to her as such mother and notifying her to appear and defend the action, in addition to a proper service made upon the minor personally, was sufficient, as a substantial compliance with the provisions of the statute.

JUDGMENTS — VALIDITY — PRESUMPTIONS.

The mere fact that a summons was defective in form would not render the judgment in the action void, where the court was one of general jurisdiction, since every fact not negatived by the record must be presumed in support of the decree.

QUIETING TITLE — PLEADING.

In an action to quiet title a complaint which alleged possession of the premises by plaintiff, that he claimed title in fee thereto, and that defendant claimed an estate or interest therein adverse to him, was sufficient to give the court jurisdiction of the subject matter, under Code 1881, § 551, which provided that any person in possession of real property might maintain a civil action against any person claiming an interest in said real property or any right thereto adverse to him, for the purpose of determining such claim, estate or interest.

SAME — RENDITION OF DECREE UPON TRIAL AT CHAMBERS.

Under Code 1881, § 2138, which provided that a judge of the district court might, at chambers, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury; and that all judgments and decrees rendered by a judge of the district court at chambers should have

June, 1901.] Opinion of the Court—MOUNT, J.

like force and effect as though rendered at a regular term of the district court, a decree in an action to quiet title cannot be held void from the fact that it recites that the cause came on for hearing before the judge at chambers.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Gleeson & Stayt, for appellant.

Happy & Hindman, for respondents.

The opinion of the court was delivered by

MOUNT, J.—William and Sarah Dennis were married on July 2, 1878. In 1879 a son, Herbert, was born to them. In 1882 J. M. Glover and wife, who were the owners of the west half of lot 3 in block 17 of the Resurvey and Addition to Spokane Falls, Washington, sold the said property to said Sarah Dennis. In 1884 William Dennis died intestate, leaving his widow and son, Herbert, as only heirs. In 1884, after the death of her husband, Sarah Dennis, a widow, sold the said realty to Henry French. In 1889 said French brought an action in the superior court of Spokane county to quiet his title against the claim of said minor, Herbert Dennis. Service of summons was had upon said Herbert and his mother. Thereafter a guardian *ad litem* was appointed and appeared in said action, but did not in his answer set forth the interest of said minor, but submitted “his rights and interests . . . to the tender consideration of this honorable court, and prays strict proof of the matters alleged in plaintiff’s complaint.” The court upon the trial found that said Herbert had no interest in the said property and that Sarah Dennis, at the time she sold said property, had title in fee in her own separate right, and entered a decree accordingly quieting title in said French. The respondents on this appeal are the successors in interest of said French. This action

was brought in the lower court by C. S. Kalb, as general guardian of Herbert Dennis, against the respondents, claiming to be a tenant in common of said property and praying to be so decreed. Upon a trial the court found for defendants and that the judgment above referred to in *French v. Dennis* was and is a valid judgment and decree, unreversed and in full force and effect, and entered judgment for defendants. Plaintiff appeals.

It will be readily observed that this is not an action to set aside the judgment in *French v. Dennis*, but one seeking to have Herbert Dennis, the defendant in that action, declared to have an interest in said property, notwithstanding a judgment declaring he has no interest. It is well, therefore, to determine at the outset whether this action is a direct or collateral attack upon that judgment. No mention of the judgment in *French v. Dennis* is made in the complaint herein. The answer, after denying all the allegations in the complaint, sets up the judgment as a bar to plaintiff's right of recovery, even if he ever had any interest in the property. The reply, after denying the allegations of the answer, sets out facts which plaintiff claims invalidated the said judgment. Vanfleet, in his work on Collateral Attack, at § 3, says:

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. . . . When a judicial order, judgment, or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. Familiar instances are where a person relies on a judgment as a justification for a trespass . . . or to show his right or title in . . . ejectment, trespass to try title, or suit to quiet title. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree." Black, *Judgments*, § 252; *Morrill v. Morrill*, 20 Ore. 96 (25 Pac. 362, 11 L. R. A. 155, 23 Am. St.

Rep. 95); *Finley v. Houser*, 22 Ore. 562 (30 Pac. 494); *Kizer v. Caufield*, 17 Wash. 417 (49 Pac. 1064).

Under all the authorities, this action is, and must of necessity be, a collateral attack upon the judgment in *French v. Dennis*, and must be so treated. It is so treated by appellant because his whole argument on this appeal is directed to show that the court erred in admitting the judgment in *French v. Dennis* in evidence in this case, upon the ground that said judgment is *void*. With this point determined, we proceed to examine errors alleged.

It is contended on the part of appellant that the court rendering judgment in *French v. Dennis* had no jurisdiction of the person of defendant, who was a minor. The law in reference to commencing civil actions in force in 1889,—the time that action was commenced,—was as follows:

“Section 1. That civil actions in the several district courts of this territory may be commenced by filing a complaint and issuing summons signed by the clerk of the court and under the seal of the court substantially as follows:

“ ‘Territory of Washington, } ss.
County of }

(Here insert names of parties plaintiff and defendant.)

“ ‘To the above named defendant: You are hereby requested to appear in the district court of the judicial district, holding terms at, within twenty days after the service of this summons, exclusive of the day of service, if served in the above county, if not served in said county, but in said district, in thirty days, if served in any other judicial district in the territory in forty days, and answer the complaint, of the above named plaintiff now on file in the office of the clerk of said court, and unless you so appear and answer, the same will be taken as confessed and the prayer thereof granted.

“ ‘Witness my hand and the seal of said court this day of, 18...

“ ‘ Clerk of said Court.’ ”

“Sec. 4. The summons shall be served by delivering a copy thereof, as follows: If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian, or if there are none within this territory, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be.” Laws 1887-88, pp. 24, 25.

The summons served upon Herbert Dennis, who was then a minor under the age of fourteen years, with the return thereto, was as follows:

“Territory of Washington, } ss.
County of Spokane.

In the District Court of the Territory of Washington in and for the Fourth Judicial District thereof, holding terms at Spokane Falls, Spokane County, in said Territory.

HENRY FRENCH, plaintiff,

v.

HERBERT L. DENNIS, defendant.

To the above named defendant:

You are hereby requested to appear in the district court of the Fourth Judicial District, holding terms at Spokane Falls, within twenty days after the service of this summons, exclusive of day of service if served in the above county; if not served in the above county, but in said district, in thirty days; if served in any other judicial district of said territory, in forty days; and answer the complaint of the above named plaintiff, now on file in the office of the clerk of said court, and, unless you so appear and answer, the same will be taken as confessed and the prayer thereof granted.

Witness my hand and the seal of this court this 28th day of May, 1889.

(SEAL)

HARRY A. CLARK, *Clerk of said court,*

By A. S. JOHNSTON, *Deputy.*

A. K. MCBROOM, *Attorney for plaintiff.*

June, 1901.] Opinion of the Court—MOUNT, J.

Territory of Washington, {
County of Spokane. } ss.

I, E. H. Hinchliff, sheriff of Spokane county, Washington Territory, do hereby certify that I served the within summons on the within named defendant, Herbert L. Dennis, in Spokane county, Washington Territory, on the 6th day of June, A. D. 1889, by then and there delivering to said defendant personally a copy of said summons.

E. H. HINCHLIFF, *Sheriff of Spokane County, W. T.*
By F. K. PUGH, *Deputy.*"

The summons served upon Sarah Dennis, mother of said defendant, is as follows:

"Territory of Washington {
County of Spokane. } ss.

In the District Court of the Territory of Washington in and for the Fourth Judicial District thereof, holding terms at Spokane Falls, Spokane County in said Territory,

HENRY FRENCH, Plaintiff,

v.

HERBERT L. DENNIS, Defendant.

To Sarah Dennis, mother of Herbert L. Dennis:

You are hereby requested to appear in the district court of the Fourth Judicial District, holding terms at Spokane Falls, within twenty days after the service of this summons, exclusive of day of service, if served in the above county; if not served in the above county, but in said district, in thirty days; if served in any other judicial district of said territory, in forty days; and answer the complaint of the above named plaintiff, now on file in the office of the clerk of said court, and, unless you so appear and answer, the same will be taken as confessed and the prayer thereof granted.

Witness my hand and the seal of this court this 28th day of May, 1889.

(SEAL) HARRY A. CLARK, *Clerk of said court,*
By A. S. JOHNSTON, *Deputy.*
A. K. MCBROOM, *Attorney for plaintiff.*

Territory of Washington, }
County of Spokane. } ss.

I, E. H. Hinchliff, sheriff of Spokane county, Washington Territory, do hereby certify that I served the within summons on the within named Sarah Dennis, mother of Herbert L. Dennis, in Spokane county, Washington Territory, on the 6th day of June, A. D. 1889, by then and there delivering to said Sarah Dennis personally a copy of said summons.

E. H. HINCHLIFF, *Sheriff of Spokane County, W. T.*
By F. K. PUGH, *Deputy.*"

It will be noticed that the only difference between the copy served on the minor and the one served on his mother is that the former runs, "To the above named defendant," while the latter runs, "To Sarah Dennis, mother of Herbert L. Dennis." The statute did not provide a form of summons which must have been followed absolutely, but the form provided should have been *substantially* followed. It was evidently the intention of the statute that, when a minor was being sued, his parent, guardian, or other person having him in care, should have notice of that fact, so that the interests of the minor might be protected; and the statute makes it imperative that both the infant and the parent or his guardian shall be served, before jurisdiction of the person can be acquired. This summons contained the title and *locus* of the court; it named the plaintiff and the defendant; it notified the mother that a complaint was on file, that her son was being sued, and that she must appear therein, and that unless she appeared within a certain time the prayer of the complaint would be granted. We certainly think this summons was sufficient to notify the person served therewith what was meant, and that she must see that her infant appeared in said action and protected his rights, or that she must do so for him. The summons substantially followed the law, was served

strictly in accordance with the provisions of the statute upon both the minor and his mother, and was therefore sufficient.

Conceding, however, that the form of the summons was defective, it does not follow that the said judgment was void, because the court was a court of general jurisdiction, and every fact not negatived by the record must be presumed to support the decree. *Belles v. Miller*, 10 Wash. 259 (38 Pac. 1050); 1 Freeman, Judgments (4th ed.), § 126; 1 Black, Judgments, §§ 223, 263, 170.

The decree recited that service was duly made, and that the property described was the separate property of Sarah Dennis. It must be presumed, in the absence of the record to the contrary, that these facts appeared to the court by competent proof. There is a wide distinction between cases where defective service is had and where no service at all is had, or where the wrong person is served. The case of *Hatch v. Ferguson*, 57 Fed. 966, cited and relied upon by appellant, is of the latter class. There the court found as a fact that one Ferguson, who had been nominated guardian of the infant heirs without bond, "was not the legal guardian of the complainants. Service of the summons in the partition suit upon him was not sufficient to bring them within the jurisdiction of the superior court for Snohomish county, and they are not bound by his appearance as their representative. The sale of their land pursuant to the order of that court is therefore void." In the case before us there is no question that the proper persons were served, but only that the service was void or so defective as to amount to a nullity.

Appellant urges that the complaint in French v. Dennis did not state facts sufficient to give the court jurisdiction of the subject matter. After alleging possession, the said complaint further alleges, "that the plaintiff claims title in

fee to the said premises, and that the said defendant claims an estate or interest therein adverse to the said plaintiff." That action was brought under § 551 of the Code of 1881. Under that section it was sufficient; but, if not sufficient under that section, after judgment reciting proofs that plaintiff holds title in fee, it could not be attacked in this collateral way. 1 Black, Judgments, § 100; Vanfleet, Collateral Attack, §§ 61, 256.

Appellant urges that the decree is void because it recites that the cause came on for hearing before the judge at chambers. There is no merit in this contention. There was no limitation in the organic act, or in any act of congress upon jurisdiction of territorial courts or the judges thereof, which prevented such court or judge from holding court at any time in his district. See § 1865, Organic Act (p. 21, Code 1881); § 1874, Organic Act (p. 23, Code 1881); § 1917, Organic Act (p. 27, Code 1881). Nor was there any limitation upon the authority of the legislature which rendered invalid § 2138 of the Code of 1881, which reads as follows:

"The several judges of the district courts in this territory, and each of them in their respective districts, may, at chambers, in vacation, entertain, try, hear and determine, all actions, causes, motions, demurrers and other matters not requiring a trial by jury; and all rulings, orders, judgments and decrees, made or rendered by a judge of the district court at chambers, may be entered of record in vacation, and shall have like force and effect as though made or rendered at a regular term of the district court."

The obvious intention of the legislature in the passage of that section of the law was, as stated in *Murne v. Schwabacher Bros. & Co.*, 2 Wash. T. 130 (3 Pac. 899): "To have all the courts in each district open at all times for the transaction of certain specified business."

Appellant urges that the court erred in refusing to allow

evidence in support of the reply. The reply alleges, in substance, that in May, 1889, a pretended action was commenced in the district court of Washington Territory, wherein Henry French was plaintiff and Herbert L. Dennis, a minor, was defendant; that said complaint filed therein did not state facts sufficient to constitute a cause of action, and that no legal service of summons was ever had in said action; but subsequently the court, without having jurisdiction of the subject-matter of the action, or of the person of the said defendant, pretended to appoint a guardian *ad litem* in said action for said defendant; that subsequently the judge of said court pretended to determine said cause at chambers, and rendered a pretended decree against defendant; that no notice of the time and place of said hearing was given to said guardian, and said guardian had no notice thereof and was not present, and said cause was not tried upon the merits; that said defendant had a good and valid defense to said action, which defense was unknown to said guardian, and was not set forth in said action; that at the time of said action said defendant was the owner in fee of an undivided one-half of said property; that defendant was and still is a minor, and that defendants in this action had full knowledge of all the facts hereinbefore set forth. Conceding that plaintiff in this action could introduce evidence *de hors* the record in the said cause of French v. Dennis to show want of jurisdiction of the subject matter of the action and of the person of the defendant, no such evidence was offered, other than that hereinbefore considered. Plaintiff, however, did offer to show that after service and after the appointment of a guardian *ad litem*, and after answer of the said guardian, no notice of the time or place of trial was given to the said guardian. While this evidence, if true, might be considered as proof of irregularity or proof

of fraud practiced by the successful party and therefore admissible in a direct attack upon the judgment to set it aside under the statute, it would not be competent to oust a court of jurisdiction once acquired, and would not be evidence of a void judgment, and was therefore properly excluded. Black, Judgments, § 245; 1 Freeman, Judgments (4th ed.), § 135; *Belles v. Miller, supra*.

No error appearing in the record, the judgment of the lower court will be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON, ANDERS, WHITE and HADLEY, JJ., concur.

[No. 3888. Decided June 27, 1901.]

W. C. SIVYER *et al.*, Respondents, v. JAY LAWYER *et al.*,
Appellants.

ORDERS MADE BY COURT — POWER OF CORRECTION.

Where a demurrer setting up two grounds of objection to a complaint was sustained by the judge without specifying upon which ground the order was made, it was not error for the judge on the same day, after the entry of his order sustaining the demurrer, to correct his order so as to specify the proper ground upon which his ruling was based, although no showing therefor had been made, other than the calling of his attention to the need of correction.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Graves & Graves, for appellants.

Thomas C. Griffitts and *Henry M. Hoyt*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The respondents brought an action in tort. The appellants demurred to the amended complaint, stating, as grounds of demurrer, (1) that the complaint did

June, 1901.] Opinion of the Court—DUNBAR, J.

not state a cause of action, and (2) that several causes of action had been improperly united in said complaint. The demurrer was sustained in the following words: "Ordered that the said demurrer be and the same is hereby sustained." Judgment was entered on the demurrer on the 3d day of February, 1900. On the same day the respondents moved the court for an order correcting the order made sustaining the demurrer, for the reason that said order, instead of being an order sustaining the demurrer generally, should have been an order sustaining the demurrer on the ground of misjoinder of causes of action, and overruling the demurrer on the ground that the complaint did not state a cause of action. Judge Prather, who was the presiding judge who sustained the demurrer to the complaint, and before whom the motion was made for its modification, granted the motion in the following words: "Ordered that the said motion be, and the same is hereby, granted, and said order is hereby modified so that the last paragraph thereof shall read, 'Ordered that the said order be and the same is hereby sustained upon the second ground thereof only,'"—that "several causes of action have been improperly united in said amended complaint;" and directed the clerk to make the amendment. Afterwards, Judge Richardson, being upon the bench, made the order dismissing the action without prejudice. The appeal is from the order modifying the judgment of dismissal, and the question is, did Judge Prather possess the power to correct the order sustaining the demurrer?

It is claimed by the appellants that the court committed reversible error in modifying said judgment; that it was, in effect, a motion to correct an error of law, and that the only manner in which this error could have been reviewed was by appeal, especially inasmuch as there was no showing accompanying the motion. An examination of the rec-

ord convinces us that this contention should not be sustained. There was no showing, it is true, but there was no occasion for any showing under the circumstances, as the judge who made the order was the judge who corrected it, and it was called to his attention immediately upon the entry of the first order. It is an undisputed right of courts to correct their records so that they shall speak the truth and carry into effect the original intention of the court. In our judgment, that is all that was done in this instance, and no good purpose would be subserved by compelling the delay and expense of an appeal.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT, WHITE and HADLEY, JJ., concur.

25 362
40 192

[No. 3471. Decided June 28, 1901.]

JAMES DALGARDNO, *Appellant*, v. THOMAS F. TRUMBULL,
Respondent.

DEFAULT JUDGMENT — VACATION — DISCRETION OF COURT.

The action of the trial court in vacating a default judgment is not an abuse of discretion, when done upon a showing that defendant's attorney had erroneously noted the day of service as being one day later than the actual day; that he attempted to serve a demurrer upon plaintiff upon the last day, as he understood it to be from his notation, and was informed that a default had been taken the preceding day; and that while proceeding to the court house to ascertain the condition of the record, he was passed by plaintiff's attorney in a conveyance, who thereby reached the court house before him and in the meantime procured the entry of a default and judgment against him.

Appeal from Superior Court, Jefferson County.—Hon. JESSE P. HOUSER, Judge. Affirmed.

Morris B. Sachs and *A. W. Buddress*, for appellant.

Trumbull & Trumbull, for respondent.

June, 1901.] Opinion of the Court—FULLERTON, J.

The opinion of the court was delivered by

FULLERTON, J.—This action was brought to foreclose a real-estate mortgage. From a judgment in favor of the respondent, the appellant appeals. The first error assigned is that the trial court erred in vacating a judgment of default entered against the respondent for failure to appear in the action within the time limited by the statute. From the showing of the respondent made in support of his motion to set aside the default judgment, it appears that at the time service of summons was made upon him he attempted to mark the day of the month thereof on the face of the summons, but by mistake noted the date as being one day later than the actual day upon which it was in fact served; that on the last day he had to appear in the action, by his own notation, he prepared a demurrer to the complaint, and took it to the office of the appellant's attorney for service, and was there informed that default had been entered against him on the previous day; that he thereupon left the office of the attorney and proceeded on foot to the court house to ascertain the condition of the record, and while on the way he was passed by the appellant's attorney driving in a conveyance; that when he reached the court house he found that the appellant's attorney had reached there a few moments before him, and had in the meantime procured the court to enter a default and judgment against him. No counter showing was made. On this showing the trial court vacated the judgment, and permitted the respondent to answer to the merits. While counsel have pressed the point with vigor, we fail to find in the action of the court any abuse of its discretion. On the contrary, it seems to us, as we said in a somewhat similar case,

“The facts disclosed by the record are such as not only to show that there was no abuse of discretion in granting

the order, but that it would have been a great abuse of such discretion to have denied it." *Reitmeir v. Siegmund*, 13 Wash. 624 (43 Pac. 878).

The remainder of the assignments go to the sufficiency of the evidence to justify the findings of fact. It would be unprofitable, and unduly lengthen this opinion, to review the record on these questions. Suffice it to say, therefore, that we are unable to find, after a careful examination of the entire record, that the disputed findings are not supported by a preponderance of the evidence.

Affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3793. Decided June 28, 1901.]

CHARLES J. MYRBERG, *Respondent*, v. BALTIMORE AND SEATTLE MINING AND REDUCTION COMPANY, *Appellant*.

NEGLIGENCE—ACTION BY EMPLOYEE FOR PERSONAL INJURIES—NON-SUIT.

Defendant is not entitled to a non-suit in an action against it to recover for personal injuries resulting from its negligence in allowing dynamite to lie for several months near the mouth of its mine tunnel, exposed to heat and rain, thereby rendering its explosive character extra hazardous, when it appears from the evidence that plaintiff had been working for nearly two months in the mine removing dirt and rocks after blasts; that he knew of the existence and proximity of the exposed dynamite, but there was nothing to show that he knew of its extra hazardous condition because of its exposure to the weather, and there was nothing in his duties requiring him to be an expert in the knowledge or use of dynamite; and there was no evidence conclusively establishing plaintiff's contributory negligence, or that the explosion was the result of the unauthorized act of a fellow servant.

25	364
30	105
30	295
31	475

June, 1901.] Opinion of the Court—HADLEY, J.

MISCONDUCT OF JUDGE — COMMENT ON FACTS WHEN RULING ON MOTION FOR NON-SUIT.

The action of the court in expressing an opinion on the facts when ruling upon a motion for non-suit, is not error, although made in the presence of the jury, when counsel have not requested the withdrawal of the jury during argument and ruling upon the motion.

ACTION FOR PERSONAL INJURIES — PHYSICAL EXAMINATION OF PLAINTIFF.

The refusal of the court to allow the physical examination of plaintiff in a personal injury case by an expert is not an abuse of discretion, when such examination is asked for by defendant in the midst of the trial. (*Lane v. Spokane Falls & N. Ry. Co.*, 21 Wash. 119, distinguished).

Appeal from Superior Court, King County.—Hon. FRANK T. REID, Judge. Affirmed.

Piles, Donworth & Howe, for appellant.

Bogle & Richardson, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is an action for the recovery of damages for injuries received by the plaintiff, respondent here, while in the employ of the defendant company, appellant here. The complaint avers that on the 27th day of July, 1898, plaintiff was in the employ of the defendant and was so employed to perform the duties of a miner in and about the mine of the defendant; that the defendant, prior to said date, negligently caused certain explosives to be deposited and exposed upon its premises about said mine in an unsafe and dangerous place, and negligently allowed said explosives to remain so exposed upon said premises for a long time; that on said date, while plaintiff was engaged in the performance of his duties in the service of the defendant about said premises, the said explosives, by some means to plaintiff unknown, were violently exploded, by reason whereof the plaintiff's eyesight and hearing were

permanently injured, his nervous system shattered, and he rendered unable to perform labor. Wherefore he claims damages from the defendant in the sum of \$15,000. The amended answer denies the material allegations of the complaint, and alleges affirmatively that the injury was caused by the negligence of a fellow servant, viz., one Charles Walters; that said Walters caused said injury by placing a drill against the rock, where powder for blasting purposes in said mine was stored, and by striking said drill with a hammer, so that said powder was exploded; that the said acts of the said Walters were not in the course of the business of mining, or pursuant to any directions or authority of the defendant, but were done by said Walters in a reckless manner, and out of the usual course of his employment; that said rock was a place where said Walters knew no drilling was to be done, and that it was liable to cause the powder there stored to be exploded, and that said injury was caused by the act of said Walters, without any act of negligence on the part of defendant. A further affirmative defense avers that the plaintiff negligently contributed to said injury, and that without such contributory negligence the injury would not have occurred; that such acts of contributory negligence were as follows, to wit, the plaintiff, after having finished his work in the upper tunnel of the mine, instead of returning to the lower tunnel, which it was his duty to do, and where he would not have been injured by the explosion caused by said Walters, loafed around the mouth of the upper tunnel, and while so loafing the plaintiff saw his fellow servant Walters place the point of a drill upon the rock where powder for blasting purposes was stored, and where said Walters and plaintiff knew powder was stored, and plaintiff saw said Walters strike said drill with a hammer before the explosion which injured plaintiff occurred, and the

June, 1901.] Opinion of the Court—HADLEY, J.

plaintiff made no protest against the action of said Walters, and did not attempt to leave said place and did not warn said Walters against danger from the act, and after said Walters had struck said drill several times while it was against said rock said explosion occurred, whereby plaintiff was injured; that both plaintiff and said Walters knew that the act of said Walters was liable to cause an explosion; that they both knew that such place was a place where powder was kept, and they both knew that the act of Walters in striking said drill with said hammer against said rock was an act which the said Walters had no right to do in the course of the business of mining, but was a reckless act, and the plaintiff knew that his remaining near said Walters while he was so acting was a reckless act on the part of plaintiff. The affirmative allegations of the answer are all denied by the reply. A trial was had before a jury, and a verdict was returned in favor of plaintiff for the sum of \$1,000. Defendant moved for a new trial, which was by the court overruled; whereupon judgment was entered upon the verdict of the jury in favor of plaintiff for the sum of \$1,000 and costs. From said judgment the defendant has appealed to this court.

The first assignment of error is that the court erred in refusing appellant's motion for a non-suit. It appears in evidence that about the time respondent began work at the mine he saw two gunny sacks on a rock near the mouth of the tunnel of the mine, which he was told contained old powder, and said powder remained there until the time of the accident. One White, a witness in behalf of respondent, as an expert on the subject of dynamite, testified that dynamite exposed for a time to the weather becomes extra hazardous and dangerous. He testified as follows:

“Question: In your opinion, Mr. White, if a mining company in its use of dynamite would allow a quantity

of dynamite, from 100 to 125 pounds, to be stored or allowed to remain on top of a rock that was of the dimensions of about 4x4x4, which rock was located anywhere from 60 to 75 feet, and may be not quite so much, from the mouth of the tunnel, and allowed to remain there from six weeks to two months in the open air, under the hot sun and the rain and the weather, now, under those conditions, in your opinion, what would be the effect on that dynamite?

Answer: It would render that dynamite rotten and dangerous. The weather and the sun would have the effect of driving out the nitro-glycerine, which is kept separate in the absorbent, and it would collect and would be extra hazardous and dangerous; powder under any circumstances is dangerous, and great care should be used in handling it, and that would be extra hazardous and dangerous.

Q. You say it would drive out the nitro-glycerine?

A. It would.

Q. What do you mean? Would it expand or evaporate, or come out in some form?

A. It would come out as nitro-glycerine, and would be, therefore, more dangerous than the way in which, in the first place, it is disseminated.

Q. Where would the nitro-glycerine go, up in the air, or down on the rocks?

A. Down on the rocks.

Q. In what form? How would it look like?

A. In melting as a liquid, and collected as crystals.

Q. Would it resemble oil?

A. It would look like oil when it was heated.

Q. What effect would the sun and rain and exposure have on that dynamite in relation to its explosiveness? Would it be more explosive in its form of pure nitro-glycerine if it is liberated from the absorbent, than while it is in the absorbent and wrapped up in the brown paper?

A. Decidedly so.

Q. Now, tell the jury, in your opinion, how explosive it is under those circumstances, supposing it was lying on that rock in the quantity of from one hundred to one hundred and twenty-five pounds, the sun having melted and allowed the nitro-glycerine to become free and run out over

June, 1901.] Opinion of the Court—HADLEY, J.

the rock, and possibly on the ground around the rock; tell the jury, in your opinion, what would explode it, and what kinds of concussion would explode it.

A. Almost any concussion; the concussion of the air might explode it under those circumstances; that is a generally accepted rule.

Q. Might it explode of its own accord under those conditions?

A. I think so.

Q. Well, you think so; you mean to swear that it would, in your opinion?

A. Yes, sir; decidedly.

Q. In your opinion, Mr. White, if any nitro-glycerine had run out on the top of that rock, and from there down on the ground, under the conditions which I stated, if a man, a miner, was wearing large boots with nails in the heels, and if there were rocks on the ground where he was walking, would it be possible, or likely and probable, that the concussion of his heel could explode that dynamite?

A. In my opinion, it would."

Appellant contends that respondent was employed as a miner, and as such he must have been chargeable as an expert in the knowledge and use of dynamite, and consequently with knowledge of the extra hazardous character of the powder upon the rock at appellant's mine when he learned it had been exposed to the elements for a time, and that, having such knowledge, he must, therefore, be held to have assumed the risk incident to working in such a place. It is further urged that the appellant as the mine owner and respondent as the miner were upon the same footing, each being engaged in the business of mining with dynamite; that one was as much chargeable with an expert's knowledge of the dangerous character of the explosive as the other; and that what was negligence in one would be held negligence in the other. We do not think the evidence shows these parties to have been upon an equal footing. It is true the respond-

ent testified that he had worked in different mines, and he had, therefore, some knowledge of mining; but his work in this mine was to remove the dirt and rock after the blasts, one Murphy being the drill man and charged with the duty of superintending and firing the shots for blasting purposes. It does not appear that respondent knew to what extent this powder had been exposed. He saw it upon the rock during the few weeks he worked at this mine before the accident, but evidently did not know about its previous exposure. The extent of its exposure was peculiarly known to appellant, and, as testified by the expert, the more extended the exposure the more hazardous it became. Moreover, the respondent's testimony shows that he was told by appellant's foreman that the powder was "old powder;" that it was "no good," and was "unuseful." Also that the president of appellant company told him he was going to have an expert examine the powder, because it was old and he did not know whether it could be used or not. We think, therefore, that it would be applying a severe and unjust rule to say that, under these circumstances, the respondent knew as much about this powder as the appellant did, and that he was as much chargeable with knowledge of its extra dangerous character as was the appellant. In any event, the master is charged with the duty of seeing that the premises where the servant is required to work are reasonably safe. In *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 257 (46 Pac. 334), this court clearly stated this general principle as follows:

"We think that in reason and upon the authority of the better considered cases, it must be held that it is a positive duty which the master owes to an employee not only to provide him with a reasonably safe place in which to work—so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made

June, 1901.] Opinion of the Court—HADLEY, J.

reasonably safe—but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence; and where the performance of this positive duty is by the master entrusted to another, his failure to perform is the failure of the master.”

It must have been manifest to the court at the time the motion for non-suit was made that the appellant had not exercised the degree of care contemplated by the above-stated rule. The fact that an explosive of a superlatively dangerous character was permitted for weeks to lie upon a rock within a few feet of the mouth of the tunnel to the mine, near which employees must daily pass and re-pass, was, we think, evidence of negligence of a high degree. There could have been no reasonable contention upon the motion for non-suit that the proximity of the explosive to the mine was due to the carelessness of a fellow servant, for the reason that the evidence as it then stood had disclosed the fact that the president of the company had knowledge of the situation, and that he was even indulging in procrastination as to the time when he should have an expert examine the powder to determine if it could be used. Two duties rested upon the appellant in the premises, viz.: First, to provide as reasonably safe environment where the respondent worked as the nature of the occupation would permit; and, second, to inform him of accompanying dangers by reason of the extra hazardous conditions. The rule governing these two duties is fully stated in *Mather v. Rillston*, 156 U. S. 391, 398, 399 (15 Sup. Ct. 464). The principle there discussed seems so peculiarly applicable to this case that we quote extensively from the opinion of the court, written by Justice FIELD, as follows:

“All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and

having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body, or limb it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves

June, 1901.] Opinion of the Court—HADLEY, J.

as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

In *Tissue v. Baltimore & Ohio R. R. Co.*, 112 Pa. St. 91, 97, 98 (3 Atl. 667), the court says:

"The inquiry is rather as to the negligence of the company in permitting so great a quantity of dynamite to be placed in such a position that an accidental explosion of it might result in death or injury to its servants. Whilst it is true that the master does not warrant the absolute safety of those whom he employs to do his work, yet as we held in the case of *The Green & Coates Streets Passenger Railway Co. v. Bresmer*, 1 Out., 103, he is bound to take heed that he does not through his own want of care expose his servant to unnecessary risks or dangers, either from the character of the tools with which he supplies him, or the place in which he requires him to operate. As the question growing out of what is here stated is one of fact it can only be determined by the verdict of a jury. Ought the company's superintendent to have known that in placing the magazine where it was placed he was exposing the men engaged in operating the road, as well as others, to a danger to which they ought not to have been exposed? The question is not whether he did have knowledge of the peculiar properties of the material which he was intrusted to handle, for his ignorance in this particular would be no excuse for the company, but whether the agent thus intrusted ought to have been one who knew that dynamite was, from its nature, liable to accidental explosions such as could not be ordinarily foreseen or provided against. We would, indeed, be unwilling to assume that either Yardley or Armstrong knew that he was subjecting these laboring men to a danger so frightful. They may, like the men themselves, have entertained the common idea, that dynamite could not be exploded but by the ordinary method of percussion. But, as we have said, this ignorance, if ignorance it was, will not excuse the company, for there was a duty resting upon it to know, as far as it

was possible to know, the character of the material which it placed in the hands of its agents. In this we are not to be understood as pronouncing upon the chemical characteristics of dynamite, for about it we know little or nothing, or as charging negligence on the company or its agents. The act of putting the magazine where it was may have been prudent, or at least not unreasonably imprudent, and the explosion may have been the result of an accident which no ordinary human foresight could provide against, hence, one for which no one can be held responsible. But however this may be, the matter is, under all the evidence, for a jury, and to a jury it must be referred."

We think the evidence shows neither that the respondent was an expert in the use of dynamite, nor that it was his duty to be such expert for the discharge of his particular duties under this employment. An ordinary miner may have a general knowledge of the dangers attending the ordinary application of dynamite in a mine, and yet be ignorant of its extra dangerous character when exposed as in this case. Knowledge of this peculiar quality of the explosive can be had only by a scientific study of its qualities, or from specific instructions by one competent to give it by reason of his learning or experience. Upon this feature of the motion for a non-suit, we think the motion was properly denied. The evidence at the time the motion was made did not sufficiently support the affirmative allegations of the answer to have justified the granting of the motion. The respondent was the only person present at the time of the accident who testified at the trial. Some were killed by the explosion, and others were not present at the trial to testify. Whatever might have been the effect upon appellant's liability if the explosion was caused by the act of Walters, as alleged in the answer, still it was a question for the jury to determine whether the explosion was due immediately to the act of Walters or to

June, 1901.] Opinion of the Court—HADLEY, J.

some other cause. The motion for non-suit was in all particulars properly denied.

The second assignment of error is that the court erred in expressing an opinion upon the facts of the case in the presence of the jury when announcing his ruling upon the motion for non-suit. The somewhat extended remarks of the court are set forth in full in the record. It is contended by appellant that the rule announced in *State v. Crotts*, 22 Wash. 245 (60 Pac. 403), applies here. That was a criminal case, and while a witness was upon the stand the court asked a number of leading and very suggestive questions. This court held that it was reversible error. The question presented there involved an act of the court in an attempt to draw forth certain evidence which was directly for the consideration of the jury, and was therefore connected with that branch of the trial of which the jury was peculiarly a part. A motion for non-suit is directed to the court only, with which the jury have nothing to do. It is doubtless the better practice for the jury to retire during the argument and ruling upon the motion for non-suit, and the court will usually direct this when it is requested by either party. We think the proper rule applicable here is stated in *Blue v. McCabe*, 5 Wash. 125, 126 (31 Pac. 431), as follows:

“When counsel make a motion for a non-suit they know that it is a challenge to the court to determine the sufficiency of the facts adduced by the plaintiff, and that in deciding the motion, the judge may find it necessary to allude to the evidence. It would be going entirely too far to hold that the denial of the motion must be limited to the formal words, since it is in the highest degree proper that the judge should give his reasons for his action. In every such a case counsel who fear the effect of what the judge may say upon the jury, should secure the absence of the jury from the court room during the argument of their motion.”

The third assignment of error is that the court erred in not requiring respondent, against his consent, to submit to an examination by an expert oculist and aurist. In *Lane v. Spokane Falls & Northern Ry. Co.*, 21 Wash. 119 (51 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821), this court held that the trial court has the power, within its discretion, to require a submission to such examination. In that case the application was made prior to the commencement of the trial. In the case at bar the application was not made until after the respondent's testimony in chief was closed, and even after appellant had examined several witnesses for the defense. The court was in the midst of the trial, and such examination would have involved a delay of the trial and the time of the court and jury. Under these circumstances we think the application was not seasonably made, and that the court, in the exercise of its discretion, committed no abuse thereof.

The remaining assignments of error relate to the refusal of the court to give certain instructions requested by appellant. We do not deem it necessary to discuss these, since what has been heretofore said in discussing the motion for non-suit bears upon the points raised by the requested instructions. An examination of the instructions given by the court satisfies us that the jury were fully and fairly instructed as to the law applicable to the case.

Since we find no material error in the record, the judgment is affirmed.

REAVIS, C. J., and DUNBAR, ANDERS, MOUNT, FULLERTON and WHITE, JJ., concur.

June, 1901.]

Opinion Per Curiam.

[No. 3650. Decided June 29, 1901.]

ELLA A. TEMPLETON, *Respondent*, v. PIERCE COUNTY *et al.*, *Appellants*.

25	377
26	478
25	377
132	289
25	377
37	201
37	202

TAXATION — EXCESSIVE VALUATION — RELIEF IN EQUITY — FRAUD.

There is no ground for relief in equity against an excessive valuation of property by the assessor for taxation, where the assessor has exercised an honest judgment, and no fraud or arbitrary or capricious action in making the assessment is shown or can be presumed, and where the property, even if overvalued, is assessed in the same proportion as other like property within the jurisdiction of the assessing officer.

SAME — EVIDENCE OF FRAUD — CHANGE BY ASSESSOR OF VALUATION REPORTED BY DEPUTIES.

The mere fact that the assessor revised and adjusted in his office the valuations placed upon property by his deputies is not evidence of fraud, in the absence of a showing that he was not familiar with the value of the property, the presumption, on the contrary, being that he did his duty when he made out and certified the assessment as finally returned.

Appeal from Superior Court, Pierce County.—Hon. JAMES A. WILLIAMSON, Judge. Reversed.

Fremont Campbell, Prosecuting Attorney, for appellants.

John P. Hartman, for respondent.

PER CURIAM.—This is an action in which it is alleged that certain property known as the “Meeker Homestead,” in Puyallup, Pierce county, was listed on the tax rolls of Pierce county for the year 1894 at \$10,240, being \$5,240 in excess of its true value; for the years 1895 and 1896 at \$10,500, being \$5,500 in excess of its true value; for the years 1897 and 1898 at \$8,700, being \$3,700 in excess of its true value. The valuation is alleged to have been made by the assessor. There was no application to the board of

equalization for a reduction of the assessment. Tender of the amount of taxes claimed to be justly due is pleaded. The prayer is that the court decree the amount of taxes the plaintiff should equitably pay, and for a cancellation of the excess, and such relief as equity should demand. The finding of the court is to the effect that for the years 1894, 1895, and 1896 the property "was illegally and unjustly listed and valued upon the tax rolls" at \$10,500, which was \$5,000 in excess of the true value; that for the years 1897 and 1898 the property "was illegally and unjustly listed and valued upon the tax rolls at the sum of \$8,700, which was \$3,200 in excess of the true value." The court placed the value of the property at \$5,500 for each year, and decreed a payment of taxes on that basis. The mere overvaluation of property by the assessor, if he acts in good faith, and in the honest exercise of his judgment, furnishes no ground for relief in equity. For excessive assessments, unless fraud is established by the proof, or may be presumed from the circumstances, equity furnishes no relief, and the remedy must be such as the statute has given. Cooley, Taxation, 775; 2 Desty, Taxation, 655. This is the general rule, and we think the decisions of this court are in harmony with the same. In *Andrews v. King County*, 1 Wash. 56 (23 Pac. 409, 22 Am. St. Rep. 136), the court says:

"We think the uniform ruling of the higher courts has been that, while equity will not interfere to correct mere mistakes or inadvertences, or to contravene or set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently, capriciously, or tyrannically refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally, and to violate a fundamental principle of the constitution."

In the case of *Whatcom County v. Fairhaven Land Co.*,

June, 1901.]

Opinion Per Curiam.

7 Wash. 102 (34 Pac. 563), it seems to have been conceded that property of the actual value of \$193,451 was assessed at \$409,081. There was also evidence tending to show that the assessor had set down arbitrarily values in his office, without examination, inquiry, or knowledge of the condition, situation, or circumstance of the subject-matter. The assessment was a great deal higher proportionately than the valuation of other similar property in the county. While the court in that case said that there was not evidence to establish constructive fraud, and decided the case as "one of palpably excessive overvaluation," yet the facts of the case disclose that the arbitrary acts of the assessor, and the disproportionate valuation of the property, as well as the palpably excessive overvaluation, were the considerations moving the court to hold the assessment illegal. From the facts in the case, as disclosed in the opinion, fraud on the part of the assessor might have been inferred, although the court said there was not sufficient evidence to establish constructive fraud. The question as to the illegality of the assessment arose in a direct proceeding to enforce the collection of the tax. *Benn v. Chehalis County*, 11 Wash. 135 (39 Pac. 365), was a case decided on a demurrer to the complaint. The complaint alleged that the assessor had valued the property without viewing it; that the value placed upon it was double the actual value. Assessing property without any knowledge of its value would be an arbitrary assessment, and it is clear from the opinion that the court considered the assessment for that reason illegal. That case was decided on the facts conceded by the demurrer. In *Olympia Water Works v. Gelbach*, 16 Wash. 482 (48 Pac. 251), the board of equalization increased the assessed valuation. The court says:

"It is a well-known fact that there is often a wide differ-

ence of opinion as to the values of property among persons acting honestly and endeavoring to get at the true value, and, as this question must be settled somewhere, the law has reposed it in the board of equalization, and made their action final. . . . It may be that there can be such action on the part of the board, fraudulent or otherwise,—such as refusing to hear testimony or depriving plaintiff of notice, etc.,—as would warrant the interference of the courts in some manner. But there can be none where the sole question presented is whether or not the board acted under an honest belief in placing a value upon the property, for this is a matter that would not be susceptible of proof. The fact that they placed a higher valuation upon the property than the witnesses placed upon it would not be conclusive evidence, unless perchance such an excessive value is fixed that fraud must be conclusively presumed.”

In *Knapp v. King County*, 17 Wash. 568 (50 Pac. 480), where lots were assessed at \$20 and \$10 a lot, and the value was not to exceed \$2 per lot, and the court found that the lots were assessed arbitrarily, and without regard to actual value, relief was granted. The court, in its opinion, said:

“The arbitrary assessment of property without the exercise of the assessor’s judgment, based upon knowledge or information, is an illegal assessment, and is a fraud upon the property owner.”

In the case of *Baker v. King County*, 17 Wash. 623 (50 Pac. 481), which was an assessment of personal property, the court held that, in the absence of fraud or malice, the action of the assessor and the board of equalization was final as to the assessment. In *Noyes v. King County*, 18 Wash. 420 (51 Pac. 1052), the court says:

“It is apparent from his testimony that the honest judgment of the assessor was exercised in arriving at the value of the two lots, and also of the improvements. Upon the question of valuation the law requires the honest exercise of judgment by the assessor, and it will not scrutinize

June, 1901.]

Opinion Per Curiam.

closely the various elements of value which were taken into consideration by him, unless some of them were palpably misleading and arbitrary."

In *Landes Estate Co. v. Clallam County*, 19 Wash. 570 (53 Pac. 670),—a case where it was claimed that the land had been fraudulently assessed at an exorbitant valuation, and the finding of the court was that the assessment was fraudulent,—this court says:

"We fully concur in the appellant's argument to the effect that an assessment ought not to be interfered with unless a substantial overvaluation is clearly established."

In *Edison Electric Illuminating Co. v. Spokane County*, 22 Wash. 168 (60 Pac. 132),—a case where the ground upon which relief was sought was that the assessment was excessive, and greatly in disproportion to the value of other property, and the board of equalization acted maliciously, and wrongfully refused to receive testimony,—the court says:

"The question of value is largely one of opinion, and in cases like the present the law has confided to the taxing officers authority to determine values. It is only when the board acts maliciously or fraudulently, or without affording the property owner an opportunity to be heard, that their conclusion as to values will be disturbed."

These decisions may be summarized as follows: Fraud on the part of the assessing officer may be presumed from a palpably excessive or exorbitant overvaluation. The court will grant relief for an arbitrary, fraudulent, or malicious excessive valuation by the assessing officer. Where the assessing officer has exercised an honest judgment, and no fraud or arbitrary or capricious action in making the assessment is shown or can be presumed, the court will not interfere. Where it appears that the assessing officer endeavored honestly to get at the true value, and there is an honest difference of opinion as to

the value, the judgment of the officer is conclusive. If property, even if overvalued, is assessed in the same proportion as other like property within the jurisdiction of the assessing officer, and the system of valuation adopted operates equally on all other property, the constitutional provision as to uniformity of taxation is complied with. There is no proof to support findings that the assessment in the case under consideration was fraudulent, capricious, or arbitrary. There is no proof of actual fraud upon the part of the assessing officer and board of equalization, and none can be inferred from the facts in the case. There was no finding of fraud by the court. The evidence shows a wide divergence of honest opinion as to the value of the property, ranging from \$4,000 to \$15,000. The character of the property itself shows that one might reasonably conclude that it was of the value placed upon it by the assessor and the board of equalization. There is no showing that it was assessed disproportionately from other property, and, when the attempt was made by the defendant to show that it was not disproportionately assessed, objection was made by the plaintiff. Under such circumstances we must presume that other property of like character was assessed in the same proportion. The assessor and board of equalization act in a *quasi* judicial capacity in making or equalizing assessments. The law presumes that they have performed their duty in a proper manner. Where the rights of the public require it, the presumption in favor of due performance is liberal, and the evidence to overthrow it must be clear. *Kimball v. School District*, 23 Wash. 520 (63 Pac. 213). The conclusion reached by the court below excludes the effect of this presumption, and the honest diversity of opinion as to the value of the property. As we have seen, mere excess in valuation, in the opinion of the court, unless it furnishes conclusive

June, 1901.]

Opinion Per Curiam.

presumption of fraud, does not authorize the interference of the court. Courts cannot convert themselves into assessors for purposes of taxation, and reassess in every case where the assessor has erred in his judgment as to the value of the property. The board of equalization is created for that purpose. The evidence in this case fails to show actual fraud on the part of the assessing officer, or facts from which fraud might be presumed. The mere fact, as testified to by the witnesses Wilson and Stewart, that the work of the deputy assessor was gone over in the office of the assessor, and finally adjusted by the assessor, even though he raised the values put upon the property by his deputies, is no evidence of fraud. There is no showing that the assessor was not familiar with the value of the property. He may have had actual knowledge, as much so as the deputy. As we have said, the presumption is that he did his duty when he made out and certified the assessment as finally returned. This presumption is not to be overcome by surmises.

We have not deemed it necessary to pass upon the sufficiency of the complaint, laches, tender, etc. We have decided the case on the broad grounds that the testimony shows no reason for the interference of a court to set aside the judgment of the assessing officers in placing a valuation on the property in controversy. For that reason the judgment and decree of the lower court are reversed and set aside, and this action is remanded, with instructions to dismiss the same at plaintiff's costs.

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[No. 3681. Decided June 29, 1901.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v.
WILLIAM S. ELY *et al.*, *Respondents*.

ADVERSE POSSESSION — OCCUPATION OF RIGHT OF WAY — INCONSISTENCY WITH EASEMENT — LIMITATION OF ACTION.

Adverse possession of portions of a railroad right of way, for purposes inconsistent with the company's use of the easement, maintained by the adverse occupant for the statutory period of limitation prescribed against actions for the recovery of real property, will bar an action by the company to recover possession thereof. (*Northern Counties Investment Trust v. Enyard*, 24 Wash., 366, distinguished).

SAME — ESTOPPEL.

Where a railroad company stands by without objection for more than ten years and permits portions of its land grant for right of way to be acquired by settlers under the preemption and homestead laws of the United States, who, together with their grantees, plat said land into city lots, make valuable improvements thereon, and expend large sums of money for taxes and for street improvements assessed against said lots, the company is estopped from asserting title to those portions of its right of way thus occupied.

SAME — DEFENSE OF PUBLIC POLICY.

Where, through the negligence and laches of a railroad company, the occupancy by others of portions of the right of way granted to it by the government has ripened into title by adverse possession, the company cannot set up the defense that the right of way was granted for public purposes only and that it would be against public policy to permit either its abandonment by the company or the acquisition of adverse rights therein by way of estoppel or of the bar of the statute of limitations.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Stephens & Bunn (C. W. Bunn and James B. Kerr, of counsel), for appellant.

Frank T. Post, Samuel R. Stern, Frederick W. Dewart, James Dawson, Henley, Kellam & Lindsley, and *Joseph Rosslow*, for respondents.

June, 1901.] Opinion of the Court—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, to recover possession of certain portions of its right of way in the county of Spokane. The complaint alleges that the plaintiff was the owner and entitled to the possession of a strip of land 400 feet wide, and that defendants had wrongfully entered thereon, and judgment was demanded for the removal of a cloud, for the quieting of title to the lands mentioned in the complaint, and for the possession of same. Separate answers were interposed by many of the defendants, separate trials had, and separate verdicts rendered. A single judgment, however, was rendered, determining all the issues in the case.

It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of congress in 1864, and that, to the title to the right of way thus granted to the Northern Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad has been continuously operated since its construction. The defendants, answering, claim title by patent from the United States government. The land was acquired under the pre-emption and homestead acts, respectively, and all the defendants or their grantors have been

in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant; and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees.

June, 1901.]

Opinion of the Court—DUNBAR, J.

The questions involved in this case are: (1) Adverse possession of respondents; (2) that the action was barred by the statute of limitations; (3) equitable estoppel by the laches and misconduct of appellant. The questions of fact were put in issue by the pleadings, were submitted to a jury and found in favor of the several defendants, and the court upon said findings entered its decree declaring the title of said lands to be in the defendants. Under our statute, the right to commence an action of this kind is barred after ten years' possession on the part of the defendants, and it may be conceded that the bar is effectual in this case if the statute of limitations runs against the appellant. It is contended by the appellant that it does not, and there is considerable discussion on the proposition of whether the interest of the company in this right of way is merely an easement, or whether it is possessed of a fee simple title. As we view the law, however, these questions are immaterial; for, if the statute runs in one instance, it would in the other. It is the contention of the appellant that the statute does not run against it, for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner; and the appellant's predecessor having been the true owner and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and consequently that the statute of limitations did not apply. The statute of limitations, we think, is not

based upon such a thought, but is purely and essentially a statute of repose, in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property (5th ed.) p. 176:

“The operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.”

That the statute of limitations is a statute of repose has been decided by all modern authority, including many decisions from this court. See *Wickham v. Sprague*, 18 Wash. 466 (51 Pac. 1055). There are no exceptions under our statute, and it must apply to the case at bar, unless the appellant's right to commence the action is guaranteed by some higher authority. The statute is as follows:

“§ 4796. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued. . . .

“§4797. . . . Within ten years,—1. Actions for the recovery of real property, or for the recovery or possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.”

It will be observed that this case does not involve in any manner a construction of the act of congress incorporating the Northern Pacific Railroad Company, or the granting to the company of its right of way. Neither is this an action against the company, as many of the actions are which are cited by the appellant. There is no attempt here to bind the company by an *ultra vires* agreement, but the attempt is on the part of the company to repudiate executed contracts and rights which have grown up through the laches, negligence, and direct agreements of the company. Neither is this an action where the court has attempted to determine how much of the right of way was necessary for the railway company to use in operating its road, but it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way, according to its own determination, it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made. Of the cases cited by appellant, the strongest one favoring its contention, and the only one, therefore, which it is necessary for us to notice is *Northern Pacific R. R. Co. v. Smith*, 171 U. S. 260 (18 Sup. Ct. 794); and it is claimed by the appellant that in this case the rule was clearly announced that the company could not abandon any portion of its right of way. There are some expressions used by the court in this case which give plausibility to appellant's contention, but there are so many different propositions involved in the case that it is hard to tell upon what exact proposition the case was decided. Great stress seems to have been placed by the court upon the defect in Smith's deed, and an examination of the cases cited by the court shows that the exact question raised in this case was not involved or considered seriously in that, although it was decided in that case that

the court had no right to determine the question of how many feet had been used and occupied for railroad purposes by the company, and that it was entitled to the number of feet that were granted to it by the government. The concluding remark of the court is as follows:

“The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action;”—

a proposition which certainly cannot be controverted. But in that case the company was in possession of the lands sought to be obtained by Smith, the allegation being that it had been, more than six years prior to the commencement of the action, in possession of the premises. So that no question of adverse possession and user or of the statute of limitations was involved; and we do not think that the supreme court of the United States, notwithstanding some expressions which are made in this case and which were not necessary for its determination, would, under the circumstances of this case, deprive these defendants of their homes and property where a title had been obtained through the government, and where, by consent, agreement, and acquiescence of the company, time and money had been expended in their improvement during all these years of quiet and undisputed possession. If the doctrine of estoppel can ever be invoked, it seems to us that it should be invoked in this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. If the rights of the government are in any way involved or jeopardized by the possession of these lands by the defendants, the government may act in the premises unaided by the appellant, whose negligence and laches have been

the cause of these investments by the defendants. The appellant should not be allowed to escape the consequences of its own wrongful acts, and reap a fraudulent benefit, by pleading the rights of the government. Indeed, our government is presumably founded upon equitable principles, not in theory alone, but in practice, and the citizen has a right to expect equitable treatment, even at the hands of the government; and it has been held that in good conscience the government is frequently estopped from asserting rights which would destroy the equitable rights of the citizen. In *State ex rel. Attorney General v. Janesville Water Power Co.*, 32 L. R. A. 391 (66 N. W. 512), it was held that leave would not be granted to the state to institute an action to forfeit the franchises of a solvent, active corporation, carrying out the purposes of its creation in supplying the necessities of a large number of people, whose securities are held by innocent persons, in the absence of a clear wilful misuse, abuse, or nonuse of its franchises. In that case the court quotes from *Commonwealth ex rel. Attorney General v. Bala & B. M. Turnpike Co.*, 153 Pa. St. 47 (25 Atl. 1105), where the court held that, in case of delay accompanied by circumstances which would estop individuals, the state was equally estopped. There the circumstances showed that a corporation had been allowed to proceed and expend large sums of money when the facts relied upon in the application for leave to bring the action to forfeit the franchises were notorious. Held, that the delay, under the circumstances, created an estoppel so as to effectually prevent the institution of such proceedings. The court, in effect, said: If the complainant were a private individual, the court would not hesitate to say that his laches were a bar; and the same rule holds good notwithstanding the application is by the attorney general on behalf of the state. The question involved is not one under

the statute of limitations, but one of laches, which may be imputed to the state as well as to an individual. While time does not run against the state, time, together with other elements, may make up a species of fraud, and estop even sovereignty from exercising its legal rights,—citing *Willmott v. Barber*, L. R. 15 Ch. Div. 105; *Attorney General v. Johnson*, 2 Wils. Ch. 102; *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1. The court, concluding, said:

“The principles here maintained should be quite rigidly applied where, as in this case, the corporation has not merely been allowed, but has been compelled, by those chiefly interested and the real moving parties, to proceed at great expense, under the franchises sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known.”

This language might be appropriately applied to the facts in this case, and could as well be applied to the individual defendants here as to corporate defendants there; for these defendants have not only been allowed to possess these lots, but the title to them has been conveyed to them by the government of the United States after a compliance on their part with the requirements of the law in relation to pre-emption and homestead claims, and after, in addition to the expense and time necessarily involved in obtaining title under these acts from the government, the expenditure of many thousands of dollars in creating permanent improvements on these lands, and in paying many thousands of dollars assessments for the improvement of streets, in addition to other taxes for the benefit of the government, with the knowledge and acquiescence, and in some cases the actual agreement, of the appellant. It is also held in *Commonwealth v. Turnpike Co.*, *supra*, that where a turnpike company is allowed, without objection,

June, 1901.] Opinion of the Court—DUNBAR, J.

to expend a large amount of money in extending its road, under authority of and a decree of court, a commonwealth is estopped to question the regularity of the proceedings under which such authority was granted. There again the court said:

“In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that while time will not run against the crown, yet time, together with other elements, may make up a species of fraud and estop even sovereignty from exercising its legal rights;”—

citing *Attorney General v. Johnson, supra*, where there was an attempt on behalf of the crown to restrain a pre-empture in the river Thames, and the court refused to entertain the bill because of the delay on the part of the attorney general in instituting the proceeding. Citing, also, *Attorney General v. Sheffield Gas Consumers Co.*, 3 De Gex, M. & G. 304. See, also, *Attorney General v. Delaware, etc., R. R. Co.* 27 N. J. Eq. 631.

As showing that the rule that the company cannot alienate any part of its right of way is not to be literally construed, it has been decided that a railroad company to which congress has granted a right of way across the public lands and sections of lands adjoining such right of way, in aid of the construction of its road, has power to dedicate to the public the right to cross its tracks and right of way. *Northern Pacific R. R. Co. v. Spokane*, 64 Fed. 506 (12 C. C. A. 246).

On the proposition that, when a corporation has made contracts in violation of its powers, the validity of such contracts can be questioned only by the government, see *National Bank v. Matthews*, 98 U. S. 621.

No case is cited by the appellant which holds that a railway company may not lose a part of its right of way by adverse possession, by abandonment or estoppel, and we do

not think that any case can be found which advances those propositions, but many courts have held the reverse. In *Pittsburgh, etc., Ry. Co. v. Stickley*, 155 Ind. 312 (58 N. E. 193), it was held by the supreme court of Indiana that adverse possession, acquiesced in by the company for the statutory period, prevented a recovery, and we cannot do better than insert a portion of the opinion of the court in that case:

“Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company’s exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads, are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists. . . . If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to re-acquire the land by purchase or condemnation. It is true that the statute entitles a railway company to take land in fee and forbids interference with the company’s exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain as a private proprietor. The state confers

the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents;"—citing *Illinois, etc., R. R. Co. v. Houghton*, 126 Ill. 233 (18 N. E. 301; 1 L. R. A. 213, 9 Am. St. Rep. 581); *Illinois, etc., R. R. Co. v. O'Connor*, 154 Ill. 550 (39 N. E. 563); *Illinois, etc., R. R. Co. v. Moore*, 160 Ill. 9 (43 N. E. 364); *Donahue v. Illinois, etc., R. R. Co.* 165 Ill. 640 (46 N. E. 714); *Illinois, etc., R. R. Co. v. Wakefield*, 173 Ill. 564 (50 N. E. 1002); *Matthews v. Lake Shore, etc., Ry. Co.* 110 Mich. 170 (67 N. W. 1111, 64 Am. St. Rep. 336); *Bobbett v. South Eastern Ry. Co.*, L. R. 9 Q. B. Div. 424; *Norton v. London, etc., Ry. Co.*, L. R. 13 Ch. Div. 268; *Erie, etc., Ry. Co. v. Rousseau*, 17 Ont. App. 483.

In *Matthews v. Lake Shore, etc., Ry. Co.*, *supra*, it was held that, after a right to use land as part of its right of way had been granted to a railroad company, and such company fenced its right of way excluding such land, and thereafter the grantor conveyed the land to the plaintiff, who inclosed the same and used it for crops and pasturage, openly and continuously, without the assent of the company, for more than fifteen years, the plaintiff acquired title by adverse possession. To the same effect are numerous other cases. In fact, it seems to be the universal authority.

The case of *Northern Counties Investment Trust, Limited, v. Enyard*, 24 Wash. 366 (64 Pac. 516), cited in appellant's reply brief in support of the position that possession for more than the statutory time on a railroad right of way was not adverse, but permissive, shows, on examination, that the circumstances surrounding it were altogether different from the circumstances surrounding the case at bar. Under the circumstances of that case it was held that the occupancy of a portion of the right

of way of the railroad company by the owner of a servient estate was not inconsistent with the easement, the occupation there being for the purposes of farming the land embraced in the right of way. We do not desire to extend the rule enunciated in that case. But, whether or not the facts in that case warranted the conclusion reached by the court, certainly the circumstances shown by the record in this case will not justify the conclusion reached in that, that the occupancy of the defendants, taken in connection with the improvements and the use to which the improvements were put, was not inconsistent with the appellant's right to use the same for railroad purposes.

In consideration of all the circumstances surrounding this case, and of the underlying principles governing rights and remedies, we are of the opinion that the judgment should be affirmed.

REAVIS, C. J., and FULLERTON, MOUNT, ANDERS, HADLEY and WHITE, JJ., concur.

[No. 3387. Decided July 1, 1901.]

THOMAS S. KRUTZ, *Appellant*, v. E. A. GARDNER, *Respondent*.

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MORTGAGES — FORECLOSURE OF ASSESSMENT LIENS — FAILURE TO MAKE MORTGAGEE A PARTY — RIGHT OF REDEMPTION.

Where a mortgagee has not been made a party to an action foreclosing a street assessment lien against the mortgaged premises as the statute authorizing such foreclosure requires, his rights as mortgagee are not barred by reason of the sale of the premises under the assessment proceedings, but his right to redeem from the assessment lien continues as though he occupied the position of a junior mortgagee as against the lien holder occupying the position of a senior mortgagee.

SAME—

In such a case, the fact that the mortgagee had instituted foreclosure proceedings and bought in the mortgaged premises at a

July, 1901.] Opinion of the Court—ANDERS, J.

sheriff's sale under the decree, without making the holder of the assessment lien a party to his action, would not affect such mortgagee's right to redeem from the assessment lien.

SAME — LIMITATION ON RIGHT TO REDEEM.

Since the right of a junior mortgagee to redeem accrues at the same time as his right to foreclose, the right of redemption is governed by the statute of limitations which provides that an action upon a contract in writing, or liability express or implied arising out of a written agreement, may be commenced within six years after the cause of action shall have accrued, and hence a mortgagee who had not been made a party to the foreclosure of a street assessment lien would be entitled to redeem from the sale thereunder at any time within six years after the maturity of his mortgage.

SAME—REDEMPTION FROM MORTGAGEE IN POSSESSION—ACCOUNTING.

One who occupies the position of a mortgagee in possession of the mortgaged premises is accountable, upon redemption thereof, for nothing more than the actual rents and profits received, and the reasonable value of the use of that part of the premises occupied by him, when there has been no wilful default or gross negligence on his part in the management of the property, less such sums as were necessarily expended by him for the preservation and maintenance of the property.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Reversed.

John P. Hoyt, for appellant.

J. C. Whitlock and Ballinger, Ronald & Battle, for respondent.

The opinion of the court was delivered by

ANDERS, J.—In November, 1882, Luther M. Robbins and Eliza J. Robbins became the owners of the property in question, and took a deed therefor in the name of Eliza J. Robbins. On March 1, 1889, Luther M. and Eliza J. Robbins executed a mortgage upon the property to Thomas S. Krutz to secure the payment of \$2,500, and the mortgage was duly recorded on March 22, 1889. In April, 1889, the city of Seattle commenced proceedings looking

to the improvement of Lenora street, and included this property in the assessment district claimed to be benefited by the improvement, and assessed against the same the sum of \$168.80. The assessment was not paid, and in June, 1890, proceedings were instituted to foreclose the lien. Neither Luther M. Robbins nor Thomas S. Krutz was made a party to the proceedings. Judgment of foreclosure followed, and on January 16, 1891, the property was offered for sale to satisfy the judgment and was bought in by the city for the amount of the assessment, penalty, interest, and costs. In March, 1894, Thomas S. Krutz commenced an action to foreclose his mortgage, making Luther M. and Eliza J. Robbins and certain other parties defendants, but did not make the city or E. A. Gardner defendant. Judgment was duly rendered, and on September 20, 1895, in pursuance thereof, the property was offered for sale, and was bought in by Krutz for the amount of his mortgage and costs. Said sale was duly confirmed on October 12, 1895. The sale to the city was confirmed on January 5, 1895, and a deed was made to the city on the 8th of January, 1895. On January 15, 1895, the city of Seattle deeded to Mary B. Gardner the interest acquired under the foreclosure of the assessment lien. Defendant E. A. Gardner claims under a deed from Mary B. Gardner. On June 17, 1897, the plaintiff herein received a deed from the sheriff for the property by virtue of his purchase at the sale under the decree of foreclosure. Thereafter Thomas S. Krutz instituted an action in ejectment against defendant, and prosecuted the same through the superior court successfully, but on appeal the judgment was reversed by this court. See 18 Wash. 332 (51 Pac. 397). On June 8, 1898, this action was commenced to redeem the property from the claim of the defendant under the assessment proceedings and sale to the city. The

July, 1901.] Opinion of the Court—ANDERS, J.

plaintiff, in his complaint, asked for an accounting by the defendant, and offered to pay any sum found to be due on said accounting. The action was tried to the court upon pleadings and proofs, and certain findings were requested by the plaintiff, which were refused by the court and other findings were made for the defendant. From a judgment dismissing the action and quieting defendant's title as against plaintiff, this appeal is prosecuted.

Objection is made here that the complaint fails to state a cause of action, but we are of the opinion that this contention is clearly untenable. It is conceded that if the assessment for the street improvement was regular and the foreclosure thereof in accordance with the provisions of the statute applicable thereto, the purchaser at the sale under such foreclosure obtained a title to the property free from all prior liens and incumbrances. But the statute under which these proceedings were had provided that the assessment liens should be foreclosed by actions at law or suits in equity, and that all persons interested in the property against which the assessment was levied should be made parties to the foreclosure proceedings. Laws 1885-86, pp. 238-243. In this instance it is admitted that the appellant was not made a party to the action to foreclose the street assessment, and it therefore follows that his rights as mortgagee were in no way affected thereby. As to him the foreclosure was absolutely ineffectual to divest his interest in the premises covered by his mortgage. *Krutz v. Gardner*, 18 Wash. 332 (51 Pac. 397); *Catterlin v. Armstrong*, 79 Ind. 514, 521; *Naylor v. Colville*, 47 N. Y. Supp. 267; *Bradley v. Snyder*, 14 Ill. 264 (58 Am. Dec. 564); *Gage v. Brewster*, 31 N. Y. 218; *Rogers v. Holyoke*, 14 Minn. 220; *Hasselman v. McKernan*, 50 Ind. 441; *Hosford v. Johnson*, 74 Ind. 481.

In the ejectment suit of *Krutz v. Gardner*, *supra*, this

court, although it was of the opinion that the foreclosure of the street assessment was not binding upon the appellant, held, nevertheless, that the foreclosure was not absolutely null and void and, in effect, that the assessment lien was still in force. And, if it be true that the respondent is the holder of a lien prior and paramount to appellant's mortgage, such lien is analogous to that of a senior mortgagee, and the right of the appellant as a junior mortgagee to redeem from the lien cannot well be doubted, unless that right has been cut off by some means recognized by law. 2 Jones, Mortgages (5th ed.), § 1064, and cases cited; *Krutz v. Gardner, supra*. And the fact that the appellant has foreclosed his mortgage in an action without making the respondent a party, and bought in the mortgaged premises at a sheriff's sale under the decree of foreclosure, does not militate against his right to redeem. See *Hasselman v. McKernan, supra*, a case directly in point. See, also, *Gower v. Winchester*, 33 Iowa, 303.

But it is contended by the learned counsel for the respondent, and the court below found, that this action was barred by the statute of limitations. This proposition is controverted by appellant, and this brings us to the consideration of that question. It is claimed on the part of the respondent that the time within which the action could be commenced is prescribed by § 4805 of Ballinger's Code, which provides that "an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued;" and in support of this position it is argued that, inasmuch as an action like the one at bar is not otherwise provided for, it necessarily follows that it should have been commenced within two years after the assessment lien matured in the year 1890. It is true that there is no provision in our statute relating to the limitation of actions designating, *in express*

July, 1901.] Opinion of the Court—ANDERS, J.

terms, the time within which actions like the present shall be commenced, but it does not necessarily follow from that fact that such an action is not therein "provided for" except by said § 4805. For instance, the statute does not expressly prescribe the time within which an action may be commenced upon a promissory note, and yet every lawyer knows that such an action may be commenced within six years after the cause of action accrues, under subd. 2, § 4798, Bal. Code, which provides generally that an action upon a contract in writing, or liability, express or implied, arising out of a written agreement, may be commenced within that time. Of course, the liability of a mortgagor upon a mortgage arises out of a written agreement, and hence, under the section of the Code last above mentioned, an action to enforce it must be commenced within six years after condition broken. The debt to secure which appellant's mortgage was given became due and payable on March 1, 1894, and therefore the appellant's right to foreclose was not barred until March 1, 1900. And as the right of a junior mortgagee to redeem from a prior mortgage is based upon the same instrument as his right to foreclose against his mortgagor, it would seem reasonably to follow, as the supreme court of Iowa has held, that his right to redeem is limited to the same time as his right to foreclose. *Gower v. Winchester, supra*; *Crawford v. Taylor*, 42 Iowa, 260.

Applying the rule above stated, it was held in the case of *Gower v. Winchester, supra*, that the right of a junior mortgagee to redeem is complete upon the maturity of the junior mortgage, and that the statute begins to run at that date. See, also, Boone, Mortgages, § 162. It was also held in that case that the question of possession of the mortgaged premises could have no influence upon the statute of limitations, for the reason that in that state (as here)

a mortgage is only a lien to secure the payment of a debt, and not a conveyance of title; the title, until foreclosure and sale, remaining in the mortgagor. From the authorities last cited it would appear that, if any provision of our statute of limitations is applicable in this case, it is § 4798, and not § 4805, Bal. Code. It will be observed that what we have said respecting the applicability of said § 4798 is based upon the assumption that the appellant's rights are simply those pertaining to an ordinary junior mortgagee. But if, by reason of his having purchased the premises in controversy at the sale under the decree of foreclosure, the appellant be regarded, as counsel claims he should be, as the owner or mortgagor thereof, then his right to redeem is not limited by any provision of the statute. Concerning the statute of limitations it is said by Jones, in his valuable treatise on Mortgages, that, so long as the relation of mortgagor and mortgagee exists, the statute does not commence to run in favor of either the mortgagor or the mortgagee. 2 Jones, Mortgages (5th ed.), § 1152. And it was held in *Parker v. Dacres*, 2 Wash. T. 440 (7 Pac. 893), that a mortgagor may pay off the lien and free the estate from the incumbrance at any time before the premises are sold under a decree of foreclosure. In this instance, as we have said, there has never been a foreclosure of the assessment lien which in any wise affected the rights of appellant either as mortgagee or owner of the premises. For the foregoing reasons, we are of the opinion that appellant's action was not barred by the statute of limitations, and the judgment must, therefore, be reversed.

It is alleged in the pleadings that the respondent has been in possession and receiving the rents and profits of the premises described in the complaint ever since the 15th day of January, 1895; and appellant, in his complaint, offered, if permitted to redeem, to pay to the respondent

July, 1901.] Opinion of the Court—ANDERS, J.

whatever sum might be found due on his lien, after deducting therefrom the amount of the rents and profits for which he should account to appellant. At the trial testimony was produced by appellant tending to show the actual value of the use and occupation of the premises for the time aforesaid, and for which appellant claimed the respondent was bound to account. The respondent denied any and all liability on his part to account for the rents and profits claimed by the appellant, but he introduced evidence to show the amount paid to the city for its interest in the premises by virtue of the foreclosure of the assessment lien, the amount of the assessment, the amount actually received for rent, and the sums paid for repairs, taxes, and water rent, and also the cost of evicting certain tenants who failed to pay rent. The trial court refused to make a finding upon the question of accounting between the respondent and the appellant, and the latter asks this court to make such finding upon the evidence adduced upon the trial. This, we regret to say, we are unable to do, for the reasons hereinafter stated. We are clearly of the opinion that the respondent is accountable to appellant for the rents and profits of the premises since they have been in his possession, and the only question requiring consideration in that regard is whether he should be held liable for any greater amount than he has received for rent and the fair rental value of that portion of the house occupied by himself and family. The rule by which the liability of a mortgagee in possession to one entitled to redeem is determined in ordinary cases is well stated by a learned author as follows:

“As a general rule the mortgagee in possession is held to the exercise of such care and diligence as a provident owner in charge of the property would exercise; but he will not be held accountable for anything more than the actual rents and profits received, unless there has been

wilful default or gross negligence on his part.” 2 Jones, Mortgages (5th ed.), § 1123.

See, also, Boone on Mortgages, § 169.

We are not satisfied from the evidence in this case that the respondent was guilty of either wilful default or gross negligence in the management of the property. In fact, it is not charged in the complaint that he was negligent respecting it. We are, therefore, of the opinion that he is accountable for nothing more than the actual rents and profits received and the reasonable value of the use of that part of the premises occupied by him, and which cannot be determined from the evidence in the record. Moreover, the respondent did not take possession of the premises as an ordinary mortgagee. That character was not assumed by him voluntarily, but was forced upon him by the application of equitable principles to a particular state of facts. He evidently supposed, and not without reason, that he was the owner of and entitled, in his own right, to the rents and profits and the use and occupation of the property, whereas in legal contemplation he was only the holder of an unforeclosed lien. Under such circumstances, a mortgagee is chargeable only with what he has received, and not with what he might have received by the use of greater diligence. 2 Jones, Mortgages (5th ed.), § 1123a.

At the trial the respondent produced, and caused to be filed, a statement of account or “bill of particulars,” showing the amount of rents received, but he did not show, nor does it otherwise appear in evidence, the value of the use of a part of the dwelling house which he occupied for some considerable time. For that, as well as the rents received, he is accountable when the amount thereof shall have been ascertained. On the other hand, the respondent is entitled to be credited with the amount of the assessment lien and interest thereon from the time it became delinquent, and

July, 1901.]

Syllabus.

the statutory penalty, but not with the costs of the foreclosure suit. He is also entitled to credit for the amount paid out for repairs, for water, and for taxes, and to this should be added the amount *necessarily* expended in evicting non-paying tenants. The respondent seems to have included in his account as stated an item of \$75, alleged to have been paid by him in settlement of a suit brought by a tenant on a bond given by respondent in an action to recover the possession of the premises. We do not think he is entitled to credit for that disbursement.

The cause will be remanded to the lower court, with directions to require an accounting between the respondent and the appellant in accordance with this opinion. When the amount which the appellant will be required to pay to respondent in order to redeem has been ascertained, and the same has been paid, the appellant will be entitled to judgment in accordance with the prayer of his complaint.

Reversed and remanded.

REAVIS, C. J., and DUNBAR and HADLEY, JJ., concur.

FULLERTON, J., dissents.

[No. 3769. Decided July 1, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. L. PARKER,
Appellant.

CRIMINAL LAW — SEPARATION OF JURY — CONSENT OF ACCUSED.

Under Bal. Code, § 6947, which provides that "juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney," it is reversible error for the court to ask defendant, in the presence of the jury, after the trial had proceeded two days without separation, and the case was almost ready to submit, if he would consent to one of the jurors returning home because of the sickness of his child, to which separation defendant was thus compelled to consent, for fear of prejudicing his case in the mind of said juror.

25	406
26	60
25	405
d38	274
d38	275

SAME — MISCONDUCT OF JURY.

A juror who has testified on his *voir dire* examination that he did not know defendant, and that he could fairly and impartially try the case, free from bias, is guilty of such misconduct as to entitle defendant to a new trial, where, after retirement to the jury room, he makes statements to his fellow-jurors of facts not in evidence against defendant, and asserts his belief in his guilt because he knew him to be a member of a gang of toughs.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Silas M. Shipley and *Morris & Southard*, for appellant.

Walter S. Fulton, Prosecuting Attorney (*John B. Hart*, of counsel), for the State.

The opinion of the court was delivered by

HADLEY, J.—This cause is a prosecution by the state of Washington against the appellant on a charge of grand larceny. The cause was submitted to a jury and a verdict of guilty as charged returned. A motion for a new trial was overruled, and appellant was sentenced to serve a term of ten years in the penitentiary, from which judgment he has appealed to this court.

It is assigned as error that the court permitted the jury to separate during the trial. The appellant's affidavit in support of the motion for new trial states the following:

"Affiant further says that during the trial of said cause, after the testimony was all in and the argument partially completed, at the hour of adjournment of court, about 5 o'clock p. m. of May 18, 1900, one of the jurors before whom the said cause was being tried, stated to the court that his daughter was very sick at his home in Renton, about twelve miles distant from Seattle, and asked permission to go home to see her; that the court, in the presence of said juror, after stating the above facts to this affiant who was then upon trial, and in the hearing of said juror,

July, 1901.] Opinion of the Court—HADLEY, J.

asked this affiant and defendant herein if he had any objection to the granting of said juror's request, and that this affiant, through fear of prejudicing said juror against himself, stated in reply thereto that he did not object provided his attorneys would not; and further suggested that some officer go with said juror; that subsequently, on the statement being made to affiant by his attorneys that he would prejudice said juror by insisting on an officer accompanying him, affiant consented in open court to the request of said juror, who was subsequently permitted to separate himself from the rest of the jury, and was given a leave of absence until the hour of 2 p. m. of May 19, 1900; that said juror subsequently separated himself from said jury, and remained separate and apart from the balance of the jury during said period, and was not during said time in the custody of any officer of the court; and that said juror subsequently united in the verdict to convict this affiant. Affiant says that his consent to the separation of said jury was not freely and voluntarily given, by reason of the manner in which he was induced to grant the same, and that affiant was prejudiced thereby."

Section 6947, Bal. Code, provides as follows:

"Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county."

It appears from the record that, prior to the time the request mentioned in the above affidavit was made by the juror, the jury had not separated. At the time of each adjournment of the court during the progress of the trial the jury were placed in the charge of sworn officers, and when the request of the one juror was granted, the remaining jurors were still kept together and in charge of officers. The conditions presented are somewhat anomalous. It is a common practice of trial courts to permit juries in ordinary criminal cases to separate at all inter-

missions of the court during the progress of the trial, when the defendant and prosecuting attorney have consented to such separation; but this course is usually adopted at the beginning of the trial, or at the first adjournment of the court thereafter, and therefore becomes the established rule of the trial. In this case the rule of keeping the jury together was pursued, and when the trial had continued for two days, and after all the evidence had been submitted to the jury, and while the argument of counsel was progressing, the request for the separation was made and the one juror was permitted to withdraw from the presence of the remainder of the jury from 5 o'clock p. m. of one day until 2 o'clock p. m. of the following day. The circumstances at the time the juror made his request and the granting thereof by the court, as set forth in appellant's affidavit, are not denied in the record. The state filed no counter affidavits. The appellant states in his affidavit that he consented in open court that the juror's request be granted, but suggested that an officer go with him. Subsequently, on the statement of his counsel that he would prejudice the juror against him by insisting upon the attendance of an officer, he gave his consent. The appellant was placed in a very trying position before the jury, and one which we believe should not have been forced upon him at that stage of the trial, particularly in view of the fact that no separation of the jury had theretofore occurred. The embarrassing situation might have been relieved by a private consultation between the court, the prosecuting attorney, and appellant and his counsel. Or the jury might have been asked to retire for a short time pending the consideration of the matter. If, then, free consent to the separation had not been given, the jury would have simply been informed that for legal reasons the request of the juror could not be granted, and thereby

July, 1901.] Opinion of the Court—HADLEY, J.

no prejudice could have arisen in the mind of the juror against either party. For humane reasons, and in order to relieve any apprehension in the mind of the juror concerning his sick daughter, an officer might have been sent to make inquiry, if consent to the separation had not been freely and voluntarily given. Undoubtedly the consent contemplated by the statute must be free and voluntary, and not such as may be said to be forced from a defendant or from the state by reason of circumstances occurring in the presence of the jury.

In *State v. Holedger*, 15 Wash. 443, 448 (46 Pac. 652), this court said:

“The appellant complains in his ninth assignment that the court erred in asking counsel for appellant, in the presence and hearing of the jury if they had any objection to the separation of the jury. In the absence of any proof to the effect that the appellant was prejudiced in any way by the action of the court, we do not feel like reversing a case on this ground alone; but we desire to take occasion to say that considering the difficulty of making such a showing of injury by the party who claims to be aggrieved, we think it is a practice which should not be indulged in by trial courts, because, as appellant complains, if they did entertain any objection to the separation of the jury they were called upon to so state in the presence of the jury, and would thereby run the risk of incurring the displeasure of some juror. The court could very easily call counsel to him and ascertain privately and without the knowledge of the jury whether there were any objections to their separation.”

The court refused to reverse the judgment in the above case, but sounded a significant note of warning to trial courts not to indulge the practice which was adopted in that case. If the case at bar stood upon an equality with the former case, we should doubtless decline to reverse it under this assignment of error, notwithstanding the admonition given in the former case. But here the trial had

proceeded for two days without a separation of the jury, and when the case was almost ready to submit to the jury the appellant was required to say, in the presence of the juror who was asking a personal favor, whether he was willing to grant it or not. The jury could not legally separate without the consent of the appellant, and we believe from the showing here that he did not voluntarily consent, within the meaning of the statute, and we therefore think the court erred in this particular.

It is also assigned as error that the court erred in refusing to grant a new trial because of misconduct of the jury. In support of this branch of the motion for a new trial the affidavits of two jurors were filed. The affidavit of one Hutton, among other things, states that a juror by the name of Hempy made the following statements to the jury during the consideration of the case in the jury room, to-wit:

“That he knew Parker was equally guilty with Collins, because they were both members of a gang of toughs who had, prior to the date of the crime alleged herein, occupied a shack in Kent, Washington; that a man had been murdered in the shack, and Parker and Collins had been implicated in the killing; that the juror Hempy recognized Parker and Collins as members of the gang, as he saw them in Kent himself.”

There is another affidavit in the record made by one Jacobs, a juror, which contains alleged statements made to him by the juror Hempy after the rendition of the verdict, as to what Hempy had said to certain jurors during the consideration of the case in the jury room. The statements in this affidavit alleged to have been made by Hempy to the jurors are even stronger than those in the Hutton affidavit, but as the facts are not stated as being within the personal knowledge of Jacobs, but only as stated to him by Hempy after the verdict, we do not attach to them the

July, 1901.] Opinion of the Court—HADLEY, J.

same weight that we do to the facts stated by the juror Hutton, which occurred in his immediate presence. These affidavits are not denied in the record. They contain further statements as to the effect which the juror's remarks had upon the verdict of the affiants, but such portions of the affidavits cannot be considered because of the well-known rule that a juror cannot be heard to impeach his own verdict. The statements in the affidavit of Hutton, as above set forth, bear directly upon the question of misconduct of a juror. Upon the *voir dire* examination the juror Hempy testified as follows:

“Q. Where do you live, Mr. Hempy?

A. At Kent.

Q. How long have you lived in this county?

A. Six years and a little over.

Q. Are you acquainted with the defendant, Lawrence Parker?

A. No, sir.

Q. Do you know John Collins, the other defendant?

A. No, sir.

Q. Have you heard of this case or these defendants?

A. No, sir.

Q. Have you talked about the stealing of this money from the First National Bank with anybody?

A. No, sir; but I have heard it spoken of at the time.

Q. You heard of it at the time?

A. Yes, sir.

Q. Did the persons who spoke of it, or that told you of it, were they persons who seemed to know the facts?

A. Not that I know of.

Q. Did what you heard cause you to form any opinion as to the guilt or innocence of the defendants?

A. No, sir.

Q. Have you any now, at the present time?

A. No, sir.

CROSS-EXAMINATION.

Q. Did you say that you had never read the newspapers about this case, this alleged bank robbery?

A. No, sir.

Q. When did you first hear of it?

A. About the time that the crime was committed.

Q. How did you come to hear of it?

A. By men speaking about it in Kent.

Q. In Kent, you say?

A. Yes, sir.

Q. Did the parties who mentioned the case purport to know the facts?

A. Not that I know of.

Q. Were they residents of Kent that were discussing it?

A. Yes, sir.

Q. At that time, or any subsequent time, have you heard anything or learned anything about the case that would cause you to form any opinion as to the guilt or innocence of the defendants?

A. No, sir.

Q. You feel satisfied that your mind is perfectly free of bias and prejudice?

A. Yes, sir.

Q. You could try the case fairly and impartially on the evidence adduced?

A. Yes, sir.

Q. Is your mind in that condition that you could give the defendants the benefit of every reasonable doubt that might arise during the trial?

A. Yes, sir.

Q. You never heard the case discussed except as you said by some resident of Kent?

A. No, sir.

Q. Is your mind in that condition toward this defendant that you would be willing to be tried by a jury composed of men of a mind of like condition as yours now is?

A. Yes, sir."

July, 1901.] Opinion of the Court—HADLEY, J.

In view of the above sworn testimony of the juror, and of his subsequent statements in the jury room, we think his conduct was most reprehensible. The statements alleged to have been made in the jury room must be taken as true, for they are not denied. If Hempy believed the statements made in the jury room, then he testified falsely upon his preliminary examination. Such conduct of a juror, when engaged in the consideration of a case, cannot be justified upon any ground consistent with the unbiased condition of mind which the law intends shall prevail in the jury box and jury room.

“It appears that while the jury was considering its verdict, one of the jurors stated to his fellows ‘that the prisoner had heretofore stolen sheep, money and other things from his father.’ Such conduct on the part of a juror is quite reprehensible, and will always prejudice the accused. Courts should distinctly charge juries in criminal cases that they must look alone to the testimony adduced in the evidence before them on the trial, and should not permit one of their number to communicate to them any fact in his knowledge not deposed to in court. Arrest the judgment and remand the prisoner.” *Morton v. State*, 1 Lea (Tenn.), 498, 499.

“The alleged misconduct of Hutchinson is specifically set forth in the motion. Upon the hearing of the motion two of the jurors, M. A. Ebaugh and W. J. Iliff, were examined as witnesses. Ebaugh testified among other things, that during the deliberations of the jury Hutchinson stated to the other members of the jury that some of his (Hutchinson’s) hedge had been burned in the same manner as the plaintiff’s hedge, by the same company, and that the company had paid him \$1.50 a rod as his damages for it; We think the motion for a new trial ought to have been granted, because of the statement made by the juror Hutchinson in the jury-room during the deliberations of the jury. Except for that statement the verdict of the jury might not have been rendered for the amount

for which it was rendered." *Atchison, Topeka & Santa Fe R. R. Co. v. Bayes*, 42 Kan. 609-611 (22 Pac. 741).

See, also, *State v. Woods*, 49 Kan. 237 (30 Pac. 520).

"Because of the evidence of the juror Gren to the jury after retirement to consider of their verdict, the fact that defendant was suspected of the former burning, and its probable injurious influence upon one or more of the jurors, this judgment must be reversed." *Mason v. State*, 29 Tex. App. 608 (16 S. W. 766).

"Third, upon the affidavit of one of the jurors 'that while the jury were in their room consulting as to their verdict, I stated to one or more of the jury that one P. McGeehan told me that he had one of those rakes from M. S. Robinson (defendant) and paid fifty-five dollars for it, and bragged tremendously on the working of the rake.' This affidavit was also stricken from the files on motion of plaintiff's counsel. It was error to strike this affidavit from the files, since it was an affidavit of a fact occurring in the jury-room, not essentially inhering in the verdict itself. Suppose the plaintiff had stepped into the jury-room and stated to the whole jury the same matter, and it had been heard or considered by them. No reasonable question could arise under the rule heretofore laid down as to the legality or propriety of receiving the affidavit of a juror as to such fact. A juror has no right to give testimony or state facts outside the case made in court to his fellow jurors, after their retirement and for their consideration, in making up the verdict in the case. The only proper way in which facts known to a juror can be given to his fellow jurors, is by having such juror sworn to testify as a witness." *Hall v. Robinson*, 25 Iowa, 91, 93.

The court declined to reverse the above case, holding that the error of the court below in striking out the affidavit was not prejudicial error, for the reason that the facts stated in the affidavit were not such as could be reasonably said to have influenced the jury in reaching its verdict. But the principle under consideration here was strongly stated by

July, 1901.] Opinion of the Court—HADLEY, J.

the court in that case, and the rule there announced as to jurors' affidavits we believe to be the correct rule here.

Under our code of criminal procedure (Bal. Code, § 6965), it is provided that misconduct of the jury is a ground for a new trial; and § 6966 provides that, when the application for a new trial is made upon that ground, the facts upon which it is based shall be stated in affidavits, as was done in this case. In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself. It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict. It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the other jurors. We do not see how any other conclusion can be reached than that they were highly prejudicial, including, as they did, the statement of alleged damaging facts concerning appellant which had not been introduced in evidence upon the trial.

We think the court erred in not granting a new trial on the ground of misconduct of the jury, and also upon the other ground heretofore stated.

We do not deem it necessary to discuss the remaining assignments of error. The judgment is reversed, and the cause remanded, with instructions to the court below to grant the motion for a new trial.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT and WHITE, JJ., concur.

DUNBAR, J.—I concur in the result and in all that is said in the opinion with the exception of the statement

that we would doubtless decline to reverse the judgment under the assignment of error if the case at bar stood upon an equality with the case of *State v. Holedger*, 15 Wash. 443. I consider the practice there animadverted upon as exceedingly prejudicial, or, at least, it might be prejudicial, without there being any way to prove such prejudice, and it ought, therefore, to be held to be prejudicial error.

[No. 3879. Decided July 1, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. REINHOLD
HARRAS, *Appellant*.

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37 414

CRIMINAL LAW — INSTRUCTIONS — POSSESSION OF STOLEN PROPERTY —
PRESUMPTIONS.

In a prosecution for cattle stealing, the refusal of the court, upon request, to instruct the jury as to the presumption, if any, arising from the possession of recently stolen property, was not error, since it was not proper for the court to single out a particular circumstance, and charge the jury what presumption they should give it, but a general charge as to the manner in which circumstantial evidence should be considered would be all that the court could be required to give.

SAME — WORDS OF SIMILAR IMPORT.

In an instruction upon the subject of circumstantial evidence the use by the court in discussing the consistency of the circumstances with the hypothesis of guilt or innocence, of the words "assumption" and "supposition," when plainly intended to be used as synonyms with the word "hypothesis," would not constitute error.

SAME — REASONABLE DOUBT.

In an instruction upon reasonable doubt, a charge by the court that the jury should decide the question of guilt or innocence "upon the strong probabilities of the case," and "the probabilities need not be so strong as to exclude all possibility of error," would not constitute error, where the court emphasizes the fact that these probabilities must be so strong as to exclude every reasonable doubt.

July, 1901.] Opinion of the Court—MOUNT, J.

SAME.

In defining reasonable doubt in a charge to the jury, the court committed no error by instructing that "It should be a doubt for which good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance such as the one you are now considering."

SAME — CORROBORATION OF ACCOMPLICES.

The failure of the court to instruct that, in order to justify a conviction, the testimony of an accomplice must be corroborated, was not erroneous, where the question of whether or not the alleged accomplice was such in fact was left to the jury, with a charge that in case they believed he was an accomplice they should consider with greater care whether his story was corroborated by any fact testified to by other witnesses, and that they could not decide the case upon his testimony alone.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

H. S. Blandford, George T. Thompson and William H. Upton, for appellant.

Oscar Cain, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

MOUNT, J.—Appellant, charged with the crime of cattle stealing, was convicted in the superior court of Walla Walla county on April 20, 1900, and was sentenced to a term in the penitentiary. Appeal was taken to this court, alleging numerous errors of the trial court in its instructions to the jury. The first error complained of is that the court refused, on request, to give an instruction relative to the possession of recently stolen property. The evidence in the case is not before us, but it seems to be conceded that one J. E. Kirkland was the owner of the stolen cattle, and that the defendant upon the trial denied the taking, and claimed to have purchased the cattle in question from one Macey. At the proper time defendant's counsel requested the court to "instruct the jury upon the

following subjects: . . . The presumption, if any, arising from the possession of stolen property." No instruction was given defining any presumption arising from possession of stolen property. This court, in *State v. Walters*, 7 Wash. 246 (34 Pac. 938, 1098), lays down the rule as follows:

"The possession of recently stolen property may or may not be a criminating circumstance, and whether it is or not depends upon the facts and circumstances connected with such possession. It is a circumstance to be considered by the jury in connection with all the other evidence in the given case, in determining the guilt or innocence of the accused; and its weight, as evidence, like that of any other fact, is to be determined by them alone. . . . Any presumption that may be drawn from such possession is a presumption of fact merely; in other words, it is only an inference that one fact may exist from the proof of another, and does not amount to a rule of law."

This being true, it was not error for the court to refuse to single out any particular circumstance, and instruct the jury what *presumption* they should give it. The court did instruct the jury generally upon circumstantial evidence, and such instruction, properly directing the jury as to the manner in which they were to look upon and consider this character of evidence, is all that the law requires. 12 Enc. Pl. & Pr. 1013; *Bonnors v. State*, 35 S. W. (Tex.) 650.

The next error complained of is in giving of the following instruction (No. 8):

"The state is not required, however, to prove these facts by direct and positive evidence. It may do so by circumstantial evidence. Circumstantial evidence is legal and competent evidence in criminal cases, and where it is all consistent with the hypothesis of the guilt of the person accused of crime, and is not consistent with the hypothesis of his innocence, and where it establishes his guilt beyond a reasonable doubt,—where all the evidence can be reconciled with the assumption of his guilt, and cannot be recon-

July, 1901.] Opinion of the Court—MOUNT, J.

ciled with the assumption of his innocence, and produces in the minds of the jury an abiding conviction to a moral certainty of his guilt,—it is the imperative duty of the jury, under the law and under their several oaths, to render a verdict finding him guilty, and they would violate their oaths if they should fail to do so, just as they would if it were all direct and positive evidence. Nor is it necessary that they should be absolutely certain of his guilt. This is impossible, in the nature of things, and the law does not require it. If it did, few crimes, perhaps, would be punished. Moral certainty of guilt, therefore, satisfies the law in this respect. But, before rendering a verdict of guilty in any criminal case, a jury should, after a consideration of all the evidence, feel morally certain—have an abiding conviction to a moral certainty—of the guilt of the accused. And if in this case, gentlemen, the evidence, though in part circumstantial, all considered, appears to your minds to be consistent with the supposition that the defendant is guilty of this charge, and inconsistent with the supposition that he is innocent of it, and you feel morally certain, though not absolutely certain, that he is guilty of it,—if you have a firm conviction abiding in your mind that he is guilty of this charge,—you will fail in your duty and violate your oath if you do not return a verdict declaring him guilty as charged. But if, on the other hand, the whole evidence in the case, as you view it, is just as consistent with the assumption of his innocence as with the assumption of his guilt, or if you do not feel morally certain of his guilt,—if you have a substantial, a sensible, a reasonable doubt, resting upon the unsatisfactory character of the evidence to establish his guilt,—your duty is just as imperative to acquit him.”

Defendant takes exception to the use of the words “supposition” and “assumption,” as used in the foregoing instruction. These words, used as they were in the instruction, are synonymous with “hypothesis,” and mean primarily, as defined by Webster, “What is not known to be true, or not proved.” If the instruction had been given with the word “hypothesis” substituted for the words

“supposition” and “assumption,” it would read: “And if in this case, gentlemen, the evidence, though in part circumstantial, all considered, appears to your minds to be consistent with the hypothesis that the defendant is guilty of this charge, and inconsistent with the hypothesis that he is innocent of it, and you feel morally certain, though not absolutely certain, that he is guilty of it, you will fail,” etc. This instruction, it seems, was only another way of saying, in order to convict, the jury must find that the circumstances proved were not only all consistent with the guilt of the accused, but were inconsistent with his innocence, such as to exclude every reasonable hypothesis but that of guilt. Juries, as a rule, do not draw fine and technical distinctions in the use of words, but, even if they did in this case, this distinction is not open to the criticism counsel seek to place upon it.

It is argued that error was committed in the use of the words “probabilities” and “strong probabilities,” as used in the following instruction (No. 9):

“Only a reasonable doubt,—a doubt based on reason,—arising from the evidence or the want of evidence in the case as to the guilt of the defendant,—only such doubt as a sensible, honest-minded man would reasonably entertain in an honest investigation to ascertain the truth,—however, should deter you from finding him guilty. A vague, whimsical, capricious, visionary or other unreasonable doubt,—a doubt based upon mere conjecture as to a remotely possible state of facts not disclosed by the evidence,—does not entitle the defendant to an acquittal, where the evidence is such as to fully and firmly convince the candid judgment of an impartial and reasonable man of the truth of the charge. On the other hand, you are not to understand that all doubt is to be discarded by you. You are required to decide the question submitted to you, whether the defendant is guilty or not guilty as charged in this information, upon the strong probabilities of the case as disclosed to you by the evidence given before you,

July, 1901.] Opinion of the Court—MOUNT. J.

and the whole of it, and the probabilities of his guilt to warrant conviction need not be so strong as to exclude all doubt or possibility of error, but must be so strong as to exclude every reasonable doubt.”

The latter part of this instruction—the part criticised by appellant—is substantially the same as that found in *Dunbar v. United States*, 156 U. S. 185 (15 Sup. Ct. 325). In speaking of this instruction, Mr. Justice BREWER uses this language:

“While it is true that it used the words ‘probabilities’ and ‘strong probabilities,’ yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. *Hopt v. Utah*, 120 U. S. 430, 439; *Commonwealth v. Costley*, 118 Mass. 1, 23.”

See, also, note to *Burt v. State*, 48 Am. St. Rep. 563, 566.

So, in this case, the court emphasized the fact that these probabilities must be so strong as to exclude every reasonable doubt. The use of the words was not error.

The statement of the trial judge at the close of his instruction on reasonable doubt is alleged as error, wherein he used the following language:

“It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance such as the one you are now considering.”

This instruction is according to the great weight of authority, and is not error. See note to *Burt v. State*, *supra*, 574.

It is next urged that the instructions ignored the rule that, to justify a conviction, the testimony of an accomplice must be corroborated. By instructions No. 12, 13, and 14, the court submitted the question of the credibility of witnesses to the jury, and by No. 15 the jury are in-

structed under what circumstances the witness Kidwell would be an accomplice, and also under what circumstances he would not be an accomplice, leaving this question to be determined by the jury. The court further instructed the jury that, in case they believed the former, "you should consider with greater care whether the story he has told on the witness stand is corroborated by any fact or facts testified to by other witnesses." And again the jury are told: "You should not, however, decide the case upon the testimony of Kidwell alone, but upon all the evidence before you. You should give it all due and candid consideration. This seems to comply with the rule as laid down by this court in *State v. Coates*, 22 Wash. 601 (61 Pac. 726), and is as favorable to defendant as required in *Edwards v. State*, 2 Wash. 291 (26 Pac. 258), and *State v. Concannon*, ante, p. 327.

Several instructions were requested by counsel for appellant, and, while they were not given in the exact language and context requested, they were all substantially given in other instructions, and it is unnecessary to review them here.

Finding no reversible error, the cause will be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON, ANDERS and HADLEY, JJ., concur.

[No. 3968. Decided July 1, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. EBEN L.
BOYCE, *Appellant*.

APPEALABLE ORDER — REFUSAL TO VACATE JUDGMENT AFTER AFFIRMANCE.

The action of the lower court in overruling a motion to vacate a final judgment, after its affirmance on appeal to the supreme court, is not an appealable order, under Bal. Code, § 6500.

July, 1901.] Opinion of the Court—DUNBAR, J.

subd. 7, which provides that any party aggrieved may appeal from any final order made after judgment which affects a substantial right, since such second appeal would not raise any questions not passed upon, or which might have been passed upon, in the original appeal.

SAME — JURISDICTION OF LOWER COURT TO MODIFY JUDGMENT AFTER AFFIRMANCE.

Where a judgment of conviction has been affirmed on appeal and the lower court directed to carry out the judgment inflicting the death penalty, an order of the lower court overruling exceptions taken to its order for the issuance of the death warrant is not appealable.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. SNELL, Judge. Appeal dismissed.

Fremont Campbell, Prosecuting Attorney, *Charles O. Bates* and *Walter M. Harvey*, for the State.

The opinion of the court was delivered by

DUNBAR, J.—On the 26th day of April, 1900, final judgment was rendered in the superior court of Pierce county, in the case of *State of Washington v. Eben L. Boyce*, on the verdict of the jury finding the said Boyce guilty of murder in the first degree, sentencing the said Boyce to be hung. An appeal was prosecuted to the supreme court from said final judgment and sentence, and the same was affirmed (24 Wash. 514, 64 Pac. 719), and on the 4th day of June, 1901, the remittitur from the supreme court was sent to the superior court and filed and entered in said superior court. Afterward the appellant, Boyce, moved the said court to set aside and vacate the said judgment, which said motion was by the superior court overruled on the 6th day of June, 1901. Exceptions were taken to said ruling, and notice of appeal given to the supreme court. This is a motion by the state to dismiss the appeal thus taken.

It is contended by the respondent that the order of the

court attempted to be appealed from is not an appealable order, and is not a final order from which an appeal will lie to this court. This contention must be sustained. The record shows that the appeal is taken from alleged errors occurring before judgment, and which errors were or could have been litigated upon the appeal from the original judgment. We do not think that the order made by the court refusing to vacate and set aside the judgment is appealable as an order affecting a substantial right under the statute. An order made by the court refusing to vacate and set aside a final decree is not appealable as an order affecting a substantial right under laws of 1893, p. 120, § 1, subd. 7 (Bal. Code, § 6500), providing that any party aggrieved may appeal from any final order made after judgment which affects a substantial right. *National Christian Association v. Simpson*, 21 Wash. 16 (56 Pac. 844).

It is conceded that all the questions raised by this motion to set aside and vacate the judgment and sentence were passed upon by the supreme court in the original appeal, or that they might have been passed upon had they been raised. Questions determined on an appeal, or which might have been if presented, will not be considered by an appellate court upon a second appeal of the same action. *Dennis v. Kass*, 13 Wash. 137 (42 Pac. 540).

The superior court was not clothed with jurisdiction to vacate a judgment which had been affirmed by this court, and which was in reality a judgment of this court. Where a cause has been appealed and a judgment rendered by the appellate court, no interference therewith will be tolerated on the part of the lower court by any proceeding in the cause other than such as is directed by the appellate court. *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591 (36 Pac. 443).

“An order denying a motion to vacate an appealable

July, 1901.] Opinion of the Court—DUNBAR, J.

order cannot be appealed from. The appeal must be taken from the original order." 2 Enc. Pl. & Pr., p. 95, and cases cited.

The appeal in this case was taken from the original order, or, rather, the original judgment, and the appeal sought here would, in effect, be a second appeal. We do not think there can be any authority which will sustain the contention of the appellant that he has a right to prosecute this second appeal, for the statement of the proposition suggests its own refutation. If such a practice were tolerated, it would result in an endless chain, which would involve an absurdity in the administration of the law that would justly bring it into disrepute and totally destroy its efficacy; for it can readily be seen that if, after judgment is pronounced against a defendant and after an affirmance of such judgment by this court,—which is, in legal effect, an order of this court to the lower court to carry the judgment into execution,—the defendant can prosecute another appeal from the judgment, based upon alleged errors occurring prior to the judgment, he can, upon the same reasoning, prosecute a third and fourth appeal, and so on *ad infinitum*, thereby virtually destroying all potency of the judgment and escaping the penalty which the law has imposed upon him. There is a rule of logic which condemns reasoning in what is termed a "vicious circle." There must, of necessity, be a rule of law to prevent practicing law in a vicious circle, and surely the practice contended for by appellant furnishes a palpable illustration of the violation of this rule. The practice would not be in consonance with reason, or any sensible system of criminal jurisprudence, but would, on the contrary, render courts powerless to enforce their judgments, would shield criminals from the just punishment which the policy of the law imposes upon its infractions, and would, in effect, be

subversive of all government. The defendant has had the benefit of a trial by the tribunals provided by law for that purpose. He has been found guilty by a jury of his peers. The verdict of the jury has been carried forward into the judgment of the court. He has appealed to this court on alleged errors of law in the trial of the cause below, and the law has, by this court, been decided against him. He availed himself of the only other means which the law provides for a rehearing of his cause, by a petition for rehearing, which, upon examination by this court, was denied. There is no other remedy or process available to him under the law. Afterward, on the 12th day of June, 1901, the superior court of Pierce county caused the defendant to be brought before the court for the purpose of issuing and signing the death warrant. Certain objections were filed by his attorneys to the issuance of this death warrant. They were overruled by the court, exceptions taken to said ruling, and notice of appeal given to this court from an order overruling said objections. The motion here includes also the dismissal of this appeal. What has been said in relation to the first notice of appeal is applicable to this. These objections were passed upon in the original appeal of the case and are now *res adjudicata*.

No brief was filed by the appellant upon this motion, but upon oral argument it was suggested that, by action of the legislature subsequent to the conviction of the appellant, laws were enacted, the result of which would be to prevent his execution. This question is not raised in the case. If any such condition exists, the law provides an appropriate remedy. But under all authority, and in consonance with the plainest reason, the motion to dismiss must be sustained, and it is so ordered.

REAVIS, C. J., and FULLERTON, ANDERS, WHITE, HADLEY and MOUNT, JJ., concur.

July, 1901] Opinion of the Court—FULLERTON, J.

[No. 3590. Decided July 2, 1901.]

ISAAC JENNINGS, *Appellant*, v. D. L. McCORMICK,
Respondent.

25	427
30	548

BREACH OF CONTRACT — LIQUIDATED DAMAGES.

Where the owners of adjoining lands, which are protected against overflow from high tides by means of dikes and dams, enter into an agreement whereby one of the owners contributes a sum of money toward the construction of a dam on the condition that certain dikes owned by the others are not to be cut, leveled, or damaged in any way, and in case they should be such sum was to be refunded to him, such sum must be regarded as a stipulation for liquidated damages to which he would be entitled on the breach of the contract.

Appeal from Superior Court, Skagit County.—Hon. JESSE P. HOUSER, Judge. Reversed.

E. C. Million, for appellant.

McBride & Joiner, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The appellant, Jennings, the respondent McCormick, and the defendant Osberg, are the owners of abutting farm lands, lying easterly of Swinomish slough, in Skagit county. The lands are what are known as tide lands, and, without the protection of dikes and dams, would be submerged at least once in every twenty-four hours by the rise of the tides. White's slough is an arm of Swinomish slough, having its mouth a short distance below the land of Osberg, from which point it extends in a general northwesterly direction across the lands of Osberg and McCormick, until it enters the land of Jennings. From thence it extends easterly and southerly, terminating in the land of McCormick. In 1891 the lands of the several parties were protected from overflow from waters coming

into this slough by means of a dike thrown up on the north and west side of the same, extending from its head to its mouth. The lands of Jennings and Osberg were also subject to overflow, at times of extreme freshets, from waters escaping from the Skagit river, against which this dike, together with an extension thereof constructed by Jennings on the east line of his land, served as a protection. In June of the year named, McCormick and Osberg conceived the idea of erecting a dam across White slough near its mouth. They solicited Jennings to contribute to the cost of the work, which he consented to do on condition that they would agree not to cut, level, or damage in any way the existing dike. Thereafter the dam was constructed, and Jennings paid toward the cost thereof two hundred dollars, and took from McCormick and Osberg the following written agreement:

“La Conner, June 22, 1891.

“I, Isaac Jennings, of La Conner, Skagit Co., Washington, agree to pay (\$200.00) two hundred dollars toward damming off White’s Slough. The said (\$200.00) two hundred dollars is to be paid when the dam is completed and received; and providing that the dike on the north side of the White Slough, owned by Andrew Osberg and D. L. McCormick or their heirs and assigns forever, is not cut, levelled or damaged in any way, and if the dike owned by Andrew Osberg and D. L. McCormick or their heirs and assigns forever be cut, levelled or damaged in any way the money is to be refunded.

D. L. McCormick,
A. Osberg.”

In 1897 McCormick, without the consent and over the protest of Jennings, destroyed a part of the dike mentioned in the agreement, and refused to rebuild the same. This action was thereupon instituted to recover the money advanced. The trial judge instructed the jury that the appellant was entitled to recover only such actual damages as he had suffered by the destruction of the dike up to the

July, 1901] Opinion of the Court—FULLERTON, J.

amount of his advancement, and that such damages were to be measured by the difference in the value of his land immediately before and immediately after the dike was destroyed. The jury returned a verdict in favor of Jennings for the sum of one hundred dollars. Judgment was entered thereon, and this appeal is taken therefrom.

The learned trial judge construed the stipulation to refund the amount of the contribution in case of a breach of the terms of the contract to be a penalty, and the question presented here is, should it be treated as a penalty, or as a stipulation for liquidated damages? Whether a stipulation in a contract to pay a fixed sum in case of a breach thereof is to be treated as the one or the other is a question not always easy of solution. Generally, it may be said, if the damages suffered by the breach of the contract are uncertain in their nature, not readily susceptible of proof under the ordinary rules of evidence, and the amount agreed upon is not so excessive as to be unconscionable, and from the whole contract and the surrounding circumstances such appears to have been the intention of the parties, a stipulation to pay a fixed sum on the breach of a contract will be treated as a stipulation for liquidated damages. *Reichenbach v. Sage*, 13 Wash. 364 (43 Pac. 354, 52 Am. St. Rep. 51). It seems to us that the present case falls within the rule. The intention of the parties is clear. There is no certain measure of the damages suffered by the breach of the contract, and the amount agreed upon is not so excessive as to be unconscionable. The damages should therefore have been fixed at the measure agreed upon by the parties.

The judgment is reversed, and the cause remanded for a new trial.

REAVIS, C. J., and DUNBAR, ANDERS and WHITE, JJ., concur.

[No. 3849. Decided July 2, 1901.]

In the Matter of the Estate of JOHN SULLIVAN, Deceased:
 THOMAS T. LITTELL, *Appellant*, v. BONNEY & STEWART
et al., Respondents.

APPEAL — DISMISSAL FOR FAILURE TO FILE BRIEF.

Where an appellant to whom no extension of time has been granted neglects to serve and file his brief in the cause within ninety days after filing his notice of appeal, his appeal will be dismissed upon the motion of an adverse party.

SAME — DEPOSIT OF MONEY IN LIEU OF BOND — CONCLUSIVENESS OF CLERK'S CERTIFICATE.

Although an appellant may have deposited a bank check instead of cash with the clerk of the superior court in lieu of an appeal bond, a certificate by the clerk to the effect that the appellant had deposited the required sum in gold coin is conclusive of the fact that money was deposited as required by the statute.

RIGHT OF ADMINISTRATION UPON DECEDENT'S ESTATE — PRINCIPAL CREDITORS.

Bal. Code, § 6141, awarding the right to administer upon a decedent's estate in certain contingencies to one or more of the principal creditors, contemplates only such creditors as were in existence prior to the decedent's death and would not include a creditor for the funeral expenses, since § 6333, *Id.*, specially protects the holder of such a claim by making it the first one payable out of the funds of the estate.

SAME.

In a contest among creditors for the administration of an estate valued at \$250,000, where the claims of all the creditors except one were for sums less than \$100, and that one's claim was for \$60,000, there could be but one principal creditor, within the contemplation of Bal. Code, § 6141, awarding administration "to one or more of the principal creditors," if there are no relatives or next of kin.

SAME — WAIVER OF RIGHT — POWER OF COURT TO APPOINT STRANGER TO ESTATE.

Where one or more of the principal creditors of a decedent's estate waive their right to administration in writing, the court may appoint any person, not a creditor, even if other creditors exist, to administer upon the estate, under Bal. Code, § 6141,

25	430
125	542
25	430
88	174

July, 1901.] Opinion of the Court—HADLEY, J.

which provides that "if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suitable and competent person to administer upon such estate."

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Craven & Craven, for appellant.

Piles, Donworth & Howe and *C. H. Farrell*, for respondents.

The opinion of the court was delivered by

HADLEY, J.—On the 3d day of October, 1900, the appellant, Thomas T. Littell, filed in the office of the clerk of the superior court of King county the following petition:

"To Hon. Wm. H. Moore, One of the Judges of the above-entitled Court:

"The petition of Thomas T. Littell of King county, state of Washington, respectfully shows: That John Sullivan died on the 26th day of September, 1900, in the city of Seattle, King county, state of Washington; that said deceased, at the time of his death, was a resident of King county, state of Washington; that deceased left estate in the said county and state, consisting of real and personal property, in moneys, personal effects and among other probable real estate, the four story business block known as the Sullivan building and the ground upon which it stands, situated on the east side of First Avenue in the city of Seattle, state of Washington, between Cherry street and Columbia street; that, as your petitioner is advised and believes and therefore alleges, there are no heirs at law of said deceased; that due search and inquiry have been made to ascertain if said deceased left a will and testament, but none has been found; and according to the best knowledge, information and belief of your petitioner said deceased died intestate; that your petitioner is a resident of the state of Washington and one of the principal creditors of said

deceased, and therefore is entitled to letters of administration of said estate; that he presents herewith a request of the other principal creditors of said estate, who are residents of said state and who are qualified to act as administrators of said estate, that he be appointed as such administrator, marked 'Exhibit A.' Wherefore, your petitioner prays that a day be appointed for hearing this application; that due notice thereof be given by the clerk of said court by posting notices according to law, and that upon said hearing and the proofs adduced letters of administration of said estate may be issued to your petitioner."

Exhibit A, referred to in said petition, and which is attached thereto, is as follows:

"The undersigned respectfully show to this court that they are the principal creditors of the estate of John Sullivan, deceased, and are residents of the county of King, state of Washington, and as such are entitled to administer upon the estate of said deceased; that your petitioners do not desire to undertake the administration of said estate, but request that Thomas T. Littell, whose petition for letters is presented and filed herewith, may be appointed administrator of said estate.

SIRA CARMAN, *M. D.*
BONNEY & STEWART,
QUICK DRUG CO.
J. B. QUICK."

On the 10th day of October, 1900, the firm of Bonney & Stewart filed a petition in the same matter, alleging substantially the same facts set forth in the petition of Littell, as above shown, with the additional statement that the estate of the deceased, Sullivan, is indebted to said firm "in the sum of \$572.50 for funeral expenses and undertakers' services rendered by said petitioners in respect to the body of said deceased." The petition further alleges "that Terence O'Brien, a resident of the city of Seattle, King county, state of Washington, was a friend of said deceased for a long period of years, and is without doubt the person

July, 1901.] Opinion of the Court—HADLEY, J.

whom said deceased would have desired to administer his estate, and is a suitable and competent person to administer such estate"; and the prayer of the petition asks that letters of administration be issued to said Terence O'Brien. There were five other petitions filed, each petition asking the appointment of a different person as administrator. Among the other petitioners were the United States Mortgage & Trust Company, a creditor of the deceased to the extent of about \$60,000, and also the state of Washington. The last named petitioner claimed the right to suggest the name of a person to be appointed administrator on the ground that all the other petitions alleged that the deceased left no heirs or next of kin, and that the property of the deceased, therefore, escheated to the state. Hearing upon the various petitions was by the court continued from time to time, and on the 16th day of November, 1900, a hearing was had upon all at the same time, and thereafter, on the 19th day of November, 1900, the court entered an order appointing Terence O'Brien administrator of said estate. From that order the petitioners Thomas T. Littell, the United States Mortgage & Trust Company, and the state of Washington have severally appealed to this court.

The appellant Littell moves to dismiss the appeals of the United States Mortgage & Trust Company and the state of Washington, respectively, on the ground that neither of said appellants has served or filed any brief herein, and that more than ninety days have elapsed since their respective notices of appeal were served and filed, and that no extension of time for the service and filing of such brief has been requested by, or granted to, either of said appellants. The motion is granted, and both of said appeals are hereby dismissed.

The respondents Bonney & Stewart and Terence O'Brien move to dismiss the appeal of Thomas T. Littell on the

ground that no legal notice of appeal was ever given or served by said appellant. No reasons are pointed out in the brief in support of this ground of the motion. An examination of the notice of appeal, proof of service, and the filing thereof satisfies us that it is a sufficient notice. Under another subdivision of the motion to dismiss, it is argued that no money was deposited in lieu of an appeal bond, but that a certificate of deposit upon a bank for the sum of \$200 was deposited with the clerk of the superior court in lieu of a bond. The record contains the following certificate by the clerk of the superior court:

"I further certify that Thomas T. Littell, on November 28, 1900, deposited with the clerk of the above-entitled court the sum of \$200 in gold coin in lieu of appeal bond on his appeal to the supreme court of the state of Washington in the above entitled cause, and that the sum of \$200 ever since said date has been, and now is, on deposit with the clerk for said purpose."

The above certificate must be taken as conclusive of the fact that money was deposited as required by the statute. Other subdivisions of the motion to dismiss involve the merits of the controversy here to such an extent that they cannot well be considered apart from the merits. The motion to dismiss the appeal of Littell is therefore in all particulars denied.

It will be observed that the name of the firm of Bonney & Stewart appears among the signatures to the exhibit above set forth as attached to the petition of appellant Littell, and who are there described as principal creditors of the deceased who do not desire to undertake the administration of said estate, but request the appointment of appellant Littell. One week later the formal petition of Bonney & Stewart was filed, which petition contains the statement of certain jurisdictional facts, is duly verified, and asks for the appointment of Terence O'Brien as ad-

July, 1901.] Opinion of the Court—HADLEY, J.

ministrator. These two requests of Bonney & Stewart are in conflict with each other, since each asks the appointment of a different person. Their formal petition last filed, however, discloses that their claim against the estate is for funeral expenses. Since their claim is not founded upon a debt of the deceased which existed at the time of his death, we think they did not belong to the class of creditors contemplated by § 6141, Bal. Code. The section just cited reads as follows:

“Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:—

1. The surviving husband or wife, or such person as he or she may request to have appointed;

2. The next of kin, in the following order: (1) Child or children; (2) Father or mother; (3) Brothers or sisters; (4) Grandchildren;

3. To one or more of the principal creditors: Provided, That if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suitable and competent person to administer such estate.”

We believe the term “creditors,” as used in said section, relates only to such as were creditors of the deceased at the time of his death, or to holders of obligations created by the deceased himself. The evident purpose of the statute is to give to those who are materially interested in the preservation and application of the assets of the estate as creditors an opportunity to administer when the other persons described in the statute do not exist or for some reason have not sought the appointment as administrator. Perhaps the

only obligation that can be created against an estate after the death of the deceased, aside from the expenses of administration, is that for funeral expenses. But the holder of such claim is specially protected by statute, and his claim is the first that can be paid. Bal. Code, § 6333. There therefore does not exist the same reason for conferring the *right* to administer upon such a claimant as that which exists in favor of the creditors mentioned in § 6141, *supra*. At the time of the hearing the claim of Bonney & Stewart was by far the largest claim against the estate, with one exception, but, for reasons heretofore stated, they did not belong to that class denominated as “creditors” for the purpose under consideration in the statute. Whatever may be said of the original request of Bonney & Stewart, or of their subsequent petition, both filed in this record, they cannot be said to be based upon any statutory *right* to ask for the appointment of themselves or any particular person as administrator. They are only suggestions to the court which may with propriety be made because of the existence of the claim for funeral expenses. The statute does not confer upon any creditor the *right* to demand the appointment of another. Such right exists only to ask his own appointment. It will be observed that the right so conferred is limited to “principal creditors.” The record shows the value of the assets of this estate to be at least \$250,000. The United States Mortgage & Trust Company, as already stated, is a creditor to the extent of \$60,000, and there is no other creditor whose claim exceeds \$100, aside from that for funeral expenses above discussed. Appellant Littell had been acting as agent for the deceased in the way of collecting rents, and received for his services \$75 per month. He testified that it was his practice at the end of each month to pay himself the amount of his salary for such month from funds so collected. The deceased died

July, 1901.] Opinion of the Court—HADLEY, J.

on the 26th day of September, 1900, and Littell testifies that he would have paid himself \$75 at the end of September if Sullivan had lived. Sullivan, at the time of his death, was therefore owing Littell the accrued portion of the salary for the month of September, together with some other small items, amounting in all to about \$90. Littell had in his hands at the time of Sullivan's death \$1,854.41, theretofore collected by him as agent aforesaid. Respondents contend that Littell was therefore not a creditor, but was a debtor, of the estate in the amount remaining after deducting \$90 from \$1,854.41. We think, however, since Littell collected and held this money as agent, that he had not the legal right to set off his claim against it after Sullivan's death. He held the money as a trustee for the estate, and was therefore not its debtor, but was technically its creditor to the extent of \$90. Littell testifies that the claim of Dr. Carman is either a little more or a little less in amount than his own; the exact amount he does not know; that the next claim in amount is probably the Kaickhefer Elevator Company's claim, it being about \$87; that the Seattle Steam Heating & Power Company's claim is for about the same amount; that following in the order of amount are the claims of the Quick Drug Company, Lundberg, Daussat, Carary, and others, the amounts of the latter claims not being stated. Under these circumstances, who were "principal creditors" of this estate, within the meaning of the statute? The word "principal" is defined in Webster's dictionary as follows: "Highest in rank, authority, character, importance, or degree; most considerable or important; chief, main." Considering the magnitude of this estate, and the very small amounts of the several creditors' claims against it, with but one exception, we believe there is but one real "principal creditor" of this estate, viz., the United States

Mortgage & Trust Company. When we contrast the \$60,000 claim of the last-named creditor with the others, all in amount less than \$100, we cannot reasonably find that there is more than one "chief" or "main" claim, within the meaning of the term "principal" as used in the statute. It is seldom that conditions exist where there is such a marked contrast between the amounts of creditors' claims as in this case. But if we assume that other claims, following in the order of amount, constitute their holders "principal creditors," then how many such principal creditors of this estate are there? Dr. Carman's claim, under the evidence, is possibly a little more than appellant Littell's claim; that of the elevator company is only \$3 less; while the Seattle Steam Heating & Power Company's claim is about the same in amount. Others are less in amount, but how much less we are unable to determine from the record. Under these circumstances, we do not think we should say that appellant Littell is a "principal creditor," and that others are not such. So far as appears from the record, they are all substantially of the same degree or rank as creditors. The statute provides that if one or more of the principal creditors in writing waive their right to administer, then the court "may appoint any suitable and competent person to administer such estate." We have said that the right exists only in favor of the creditor himself. When, therefore, he asks in writing for the appointment of another, he thereby waives his statutory right. We have, therefore, in this record the written waiver of the following creditors, viz.: the United States Mortgage & Trust Company, the chief creditor, Dr. Carman, the Quick Drug Company, Louis Daussat, and Marie Carary,—five in all. It may be said that the mortgage company is disqualified because it is a foreign corporation. It is contended that it was duly authorized to transact

July, 1901.]

Syllabus.

business in this state, and that one of the special powers conferred by its articles of incorporation is to administer upon estates. Whatever may be said of its competency, it is, in any event, the chief creditor, and whatever rights it may have had in the premises it waived in writing when it petitioned for the appointment of another person. But, leaving the mortgage company entirely out of this consideration, there are four other creditors, of substantially the same degree with the appellant, who have in writing waived their right. Under all these circumstances, we believe the court clearly was empowered to appoint "any suitable and competent person." He might have appointed the appellant, who was no doubt suitable and competent; but, in the exercise of his discretion, he appointed another, and, since there is no showing or claim that the one appointed is not a suitable and competent person, we do not think this court should interfere with the discretion exercised by the probate court. It must be presumed that appellant's rights as a creditor will be properly protected by the court in due course of administration.

The judgment of the lower court is therefore affirmed.

REAVIS, C. J., and ANDERS, WHITE, DUNBAR, MOUNT and FULLERTON, JJ., concur.

[No. 3685. Decided July 3, 1901.]

MAGGIE J. ZIEGLER *et vir*, Respondents, v. CITY OF SPOKANE, Appellant.

MUNICIPAL CORPORATIONS — DEFECTIVE WALKS — QUESTION FOR JURY.

In an action for personal injuries received from a fall upon a sidewalk, the question of the city's negligence was properly submitted to the jury, where there was evidence tending to show that the sidewalk was full of holes caused by the decay of the materials of which it was constructed and that plaintiff's fall was caused by her stepping into one of these holes, although the

evidence showed that on the day preceding the accident a fall of slushy snow occurred, which froze hard during the night, leaving the walk in a very slippery condition, and there was evidence from which it might be inferred that the icy condition of the walk was the cause of the accident.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

A. G. Avery and *F. M. Dudley*, for appellant.

Sullivan, Nuzum & Nuzum and *Graves & Graves*, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—This is an action for personal injuries received by respondent Maggie J. Ziegler from a fall upon the sidewalk of the appellant city. From a judgment in favor of the respondents the city appeals. The only error assigned is that the evidence was insufficient to justify the submission of the cause to the jury. The evidence tended to show that the sidewalk upon which the respondent fell was old and worn out, full of holes, caused by the decay of the materials of which it was constructed, and in a generally unsafe condition for ordinary travel; that on the day preceding the accident a fall of snow occurred, which, owing to the temperature, was wet and slushy; that during the night it froze hard, leaving the walk at the time of the accident in a very slippery condition. It is the contention of the appellant that the efficient and proximate cause of the injury to the respondent was the slippery condition of the walk, and that, under the circumstances shown, it is not liable therefor. While the testimony of the injured respondent herself is not clear as to the cause of the accident, and while it might be inferred from the testimony of other witnesses that the icy condition of the walk was a concurring cause, if not the proximate cause,

July, 1901.]

Syllabus.

of the fall which caused the injury, yet there was competent testimony on the part of the plaintiff tending to show that the respondent stepped into a hole in the walk, and that this was the cause of her fall and her consequent injury. It was thus for the jury to determine whether the mere slipperiness or the defective condition of the walk was the proximate cause of the accident, and it was not error on the part of the trial court to submit the question of the appellant's liability to them.

The judgment is affirmed.

REAVIS, C. J., and DUNBAR, ANDERS and WHITE, JJ.,
concur.

[No. 3925. Decided July 3, 1901.]

J. J. McDONALD, *Respondent*, v. A. W. SVENSON *et al.*,
Appellants.

MASTER AND SERVANT — INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Where a vessel was moored within two feet of a dock, and no method was provided by the master for reaching the dock from the vessel, other than that afforded by stepping from the pin rail or the mizzen rigging to the dock, a longshoreman who had been working on the vessel for three days and a half, who was injured by being precipitated on a pile between the vessel and the dock, because of the breaking of a ratline in the rigging upon which he had stepped to gain the dock, was not guilty of contributory negligence, because he used that method instead of a gang plank, when it was customary for the master and all the sailors to use the ratlines for stepping ashore, and the gang plank had never been put out except in a couple of instances for the use of ladies.

Appeal from Superior Court, King County.—Hon.
ORANGE JACOBS, Judge. Affirmed.

Metcalf & Jurey, for appellant.

Wilmon Tucker and *Ivan L. Hyland*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Action for damages for personal injuries against the owners of the schooner Fred E. Sander, and the master thereof. While this vessel was lying moored alongside the end of the wharf at Ballard, taking on a cargo of lumber from the wharf, the respondent was employed thereon as a longshoreman, and was engaged in storing lumber in the hold of the vessel. The space between the vessel and the wharf was about two or three feet, the vessel being as near as it could conveniently be brought. At high tide the deck of the vessel was a little above a level with the wharf, and at low tide about five feet below the wharf. The mizzen rigging, from which the respondent fell, consists of three wire cables, passing up through the rail of the ship, converging as well as inclining inward, as they proceed, to one connection high up on the mast. The forward one of these shrouds, together with the center one, constitute the fore mizzen rigging. The hindmost one, together with the center one, constitute the aft mizzen rigging. About two feet above the rail, a large iron bar, called the shear pole, extends across the fore and aft rigging parallel with the rail, and is securely lashed to each of the shrouds of the mizzen rigging. About two feet above the shear pole, and parallel with it, two pieces of timber, each two by six inches, are lashed together, clamping the shrouds of the mizzen rigging and constituting practically a solid piece of timber, four by six inches, and extending to the fore and aft mizzen rigging, constituting what is called the pin rail. Rungs or rat-lines,—pieces of wood about one and one-half inches in diameter,—are lashed on the shrouds of the fore and aft mizzen rigging at intervals of from about eighteen inches to two feet, and constitute a ladder for going aloft. There is one of these rungs below the shear pole, and one between

July, 1901.] Opinion of the Court—DUNBAR, J.

the shear pole and the pin rail. It is admitted that both the shear pole and the pin rail are sufficiently strong to bear the weight of a man in jumping from them to the wharf. At the time of the accident the tide was out, and the vessel was resting upon the mud flats. When the dinner hour was announced, the respondent started to go to the wharf, climbed up the rigging until he reached one of these ratlines, which he says was on a level with the wharf, turned and attempted to step from the ratline to the wharf, when the ratline broke, and he was precipitated into the waters below between the vessel and the wharf, striking a pile which had been left there, and causing the injury of which he complains. Upon the trial of the cause, after the plaintiff's testimony was in, a motion for judgment was made by the defendants on the ground that the testimony of the plaintiff was not sufficient to warrant a verdict. The motion was overruled, the defendants introduced their testimony, the cause was submitted to the jury, and a verdict for \$1,200 was rendered in favor of the plaintiff. Judgment was entered in accordance with the verdict, from which judgment this appeal is taken.

It is contended by the appellants that the complaint did not state facts sufficient to constitute a cause of action. No demurrer, however, was interposed to the complaint, nor was there any objection to the admission of testimony under it; and the objection is raised here for the first time. We think the complaint is amply sufficient to sustain the verdict, after judgment, at least, if, indeed, it was not invulnerable to a demurrer,—a question on which we are not called upon to pass.

A great many authorities are cited, and much discussion has been indulged in, in relation to the law governing the responsibility of masters and servants. This court has so often passed upon this question that it would serve no good

purpose to review these authorities again. It may be said, in accordance with the rule so often promulgated by this court, and in fact by all other courts, that it is the duty of the master to furnish a safe place for the servant to work in, and safe appliances for him to work with, and that it is equally the duty of the servant to exercise common-sense caution in operating such appliances, and he is also responsible for the result of apparent dangers. An amplification of this statement would not make the law appear any plainer. So that the pertinent question here is, Under the circumstances surrounding this case, was the respondent guilty of contributory negligence in undertaking to step from the ratlines to the wharf, instead of either stepping from the pin rail, or calling upon the master to furnish him a gang plank by which to reach the wharf? The respondent was very sharply cross-examined, and was made to assert that he had not complained to the master about the method of exit; it appearing that the manner in which he left the boat upon the day of the accident was the manner in which he had been accustomed to leave it during his employment on that ship,—which had been for three days and a half,—and the manner in which others, including the master, had been accustomed to leave it. But we do not think that the respondent was called upon to ask the master to put out a plank to assist him in reaching the wharf, or to complain that no plank was there, for the reason, that, as the rigging was commonly used for that purpose, he had a right to assume that the means provided were, in the absence of any apparent danger, safe means. It is not for a longshoreman, especially, who is in no way connected with the ship, to inspect the rigging of the ship, to ascertain whether or not it is kept in a safe condition. He has a right to assume that the inspection has been made by those who have control and care of the ship, and that he

July, 1901.] Opinion of the Court—DUNBAR, J.

will not be called upon to make his exit from the boat over a way which is dangerous. There was testimony in the case showing that this particular ratline was of fir, and that it was more or less decayed. The respondent offered testimony, also, showing that these ratlines were ordinarily made of hard timber, while in this instance they were made of fir; also that the ratlines were usually made of rope with wood on top to prevent the wearing of the rope, while in this instance there was no rope under the wood, and nothing to protect the ratlines but their own inherent strength. This ratline was about two feet and a half long, and it is earnestly contended by the appellants that it was used by the respondent for a purpose for which it was not originally constructed, and for which it was not generally used; that it was constructed and used by the sailors for the purpose of ascending to the rigging above; that the respondent could have as conveniently stepped upon the pin rail, which is conceded to have been a secure footing, as from the ratline; and that having chosen the least secure way of leaving the ship, his master cannot be held responsible for damages which ensued. It is also contended that ratlines are not intended to hold a man's full weight, but that, as in the case of a ladder, the weight of the person ascending would be distributed by holding on to the sides of the ladder with his hands, and that therefore the respondent used the ratline in this instance for an unusual purpose. But we think the distinction attempted to be made here is not a sensible one. These rungs or ratlines are made for the ascending of sailors in all sorts of weather, and under all circumstances, when they cannot be presumed to be particularly upon their guard in relation to the exact amount of weight that is placed upon them, and they have a right to rely upon the safety of the appliances prepared for their ascension.

If this ratline had broken when a sailor was ascending it legitimately, there can be no question of the responsibility of the master under the general rule. Under the circumstances as shown here, its use was legitimate, because it was the common way by which the workmen ascended from the deck of the vessel to the wharf. Much stress is laid by the appellants upon the fact that the respondent had notice that this was not a safe way of egress, from the fact that on two different occasions a gang plank had been put out for the purpose of transferring the captain's daughters from the ship to the wharf. But it seems to us that no weight can be attached to such a circumstance as this; for, however safe the rigging way may have been for sailors or for men, it might not be said to be either safe or appropriate for the egress of women. The testimony of the respondent was to the effect that he stepped upon the round which was even with the wharf; that, when he came to the place that was even with the wharf, he simply stepped towards the shore, and would have reached there, without any question, had not the round broken. It cannot be said that the pin rail would always be in a convenient position to step upon for the purpose of reaching the wharf; for, as the vessel rises or sinks according to the condition of the tide, the pin rail might be absolutely inadequate. The rigging was there used commonly and by the master for the purpose of reaching the wharf. The respondent was justified in concluding that it was intended to bear a man's weight. That would be its natural and obvious purpose. And we are unable to say that, as a question of law, the respondent was guilty of contributory negligence in using the means provided for ascending from his work to the wharf; and we would have to so hold in order to reverse the case on the proposition of negligence, for all the circumstances of the case, and the ques-

July, 1901.]

Syllabus.

tion of whether it was negligence under the circumstances as proven, as well as all questions of weight of testimony on matters upon which the testimony was conflicting, were submitted to the jury.

It is also contended that the court erred in certain instructions, but an examination of the instructions convinces us that the law as announced by the court was fully as favorable to the appellants as it ought to have been.

There were some general remarks to the jury indulged in by the court, to which exceptions have been taken by the appellants; but, while the talk of the court was rather unnecessary, we are convinced that it was entirely harmless, and that the appellants could have been in no wise injured thereby.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT, HADLEY and WHITE, JJ., concur.

[No. 3870. Decided July 6, 1901.]

GEORGE W. BOYD, *Respondent*, v. THURINGIA INSURANCE COMPANY OF ERFURT, GERMANY, *Appellant*.

INSURANCE — POLICY ISSUED TO MORTGAGEE — EFFECT OF ALIENATION BY MORTGAGOR.

Where a policy of fire insurance was issued to a mortgagee, "loss, if any, payable to the mortgagee as interest may appear," and the policy provides that if with the consent of the company an interest under the policy shall exist in favor of a mortgagee, the conditions contained in the policy "shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto," the rights of the mortgagee under the policy would be unaffected by the act of the owner in violating the conditions in the policy against alienation and subsequent insurance, when such conditions were not attached to or written upon

that part of the contract in the policy giving the mortgagee an interest thereunder (ANDERS, J., dissents).

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

McBride & Folsom, for appellant.

Adolph Munter, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This appeal is from a judgment in favor of respondent, entered on the complaint and answer in an action against appellant on a fire insurance policy. Plaintiff sued as assignee of a mortgage on the premises upon which was situated a building covered by insurance. The complaint alleges, in substance, that one Andrew Raub was the owner of land upon which was situated a house; that he borrowed \$400 from one Minnie Wegner, and, as security therefor, executed a mortgage upon the premises, and agreed in said mortgage to keep said house insured in the sum of \$300, loss, if any, payable to said Minnie Wegner, her heirs or assigns, until the said mortgage was fully paid; that subsequently, and on the date of said mortgage, insurance was procured of appellant upon said property in the sum of \$300, loss, if any, payable to Minnie Wegner as her interest might appear, and said policy was thereupon delivered by said appellant to said Wegner; that subsequently Andrew Raub transferred his interest in the said property to one Edith Sheridan, without the knowledge of the mortgagee; that the house was thereafter totally destroyed by fire, and was of greater value than the insurance; that no payments have been made upon the said mortgage, and that proofs of loss were offered by said Wegner, but that appellant refused to accept such proofs and to pay the said loss; that said Wegner thereafter assigned her rights under said pol-

July, 1901.] Opinion of the Court—MOUNT, J.

icy, as well as her mortgage, to plaintiff, who brought this suit praying for judgment for \$300 and costs. The allegations of the complaint were not denied. The said policy of insurance, a copy of which is made a part of the complaint, contains among others, the following provisions: It names Andrew Raub as the insured, and the limit of liability \$300, "loss, if any, payable to Minnie Wegner, mortgagee, as interest may appear."

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy; or if any change other than by death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise. . . . If with the consent of this company an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended thereto. . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto."

An answer was filed, alleging, in substance, that the insurance company had not been notified, and had not consented to the transfer of the property by Raub to Edith Sheridan; that said Edith Sheridan, in violation of the terms of the policy to Raub, and without the knowledge or consent of defendant, had secured other insurance upon the building; that the latter policy provided that the insurer should be liable only for such proportion of the actual

loss sustained as \$800 would bear to the whole amount of insurance; that this policy of insurance was collected by said Edith Sheridan after the loss; that the said house did not exceed in value the sum of \$800; and that the land upon which the house was situated greatly exceeds in value the amount of the mortgage. The demurrer to this answer was sustained, and judgment entered in favor of plaintiff.

The questions raised upon this appeal depend upon the question whether Andrew Raub was the insured under the policy of insurance, or whether Minnie Wegner was the insured. The determination of this question must depend upon the construction of the contract of insurance. The general rule is that where a mortgagor procures a policy of insurance to be issued to himself, loss, if any, payable to the mortgagee as interest may appear, the former is the insured, and subsequent alienation avoids the policy. *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Continental Ins. Co. v. Hulman*, 92 Ill. 145 (34 Am. Rep. 122); May, Insurance (4th ed.), § 452 D. But, where the mortgagee is the party intended to be insured by the policy of insurance, no subsequent acts of the mortgagor will invalidate the policy of insurance. *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165 (27 L. R. A. 614); *City Five Cents Savings Bank v. Pennsylvania Fire Ins. Co.*, 122 Mass. 165; *King v. State Mutual Fire Ins. Co.*, 54 Am. Dec. 683, and note; *Pioneer Savings & Loan Co. v. Providence, etc., Ins. Co.*, 17 Wash. 175 (49 Pac. 231, 38 L. R. A. 397).

Minnie Wegner loaned Andrew Raub \$400, and it was agreed in the mortgage that the building on the property mortgaged should be insured for a less sum, loss payable to her or her assigns. The policy in question was issued and delivered to her. The mortgagor then sold the property. Loss occurred. The insurance company refused to comply

with its contract, claiming forfeiture under the clause prohibiting alienation, and on account of insurance subsequently procured by the grantee of the mortgagor. This contract should be construed as any other contract,—in accordance with its purport and in connection with its surroundings. It was well understood at the time the policy was issued that until the mortgage debt was paid, Raub had no interest in the policy. He was the owner of the property insured, but the mortgagee, who was the payee named in case of loss during the existence of the mortgage and the life of the policy, was, in case of loss, entitled to the whole of the insurance. The policy was delivered to and held by her, and, notwithstanding Raub was named as the insured, she was the real beneficiary. Following the provision naming the clauses for which the policy was to be avoided was this provision:

“If with the consent of this company an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended thereto.”

It seems plain that when the company consented to the existence of the interest of Minnie Wegner by recognizing her as mortgagee and payee, and delivering the contract to her, and when it said “the conditions hereinbefore contained shall apply in the manner expressed in such provisions . . . as shall be written upon, attached or appended thereto,” and when in the slip recognizing her as mortgagee and payee no provisions relating to forfeiture were contained, the effect of such action by the company was as though it had said, expressly, “This insurance shall not be invalidated by any act or neglect of the mortgagor

of the within described property, nor by any foreclosure, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy, nor by the owner procuring other insurance," etc. When a person of ordinary intelligence read the provisions of the policy, and referred to the slip attached, recognizing him as having an interest, he would at once conclude that he was insured under the policy, and that the mortgagor could not by any subsequent act of his, without the knowledge of the mortgagee, render the policy void as to the mortgagee. In the case of *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717 (66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663), the court, in construing the provision in question here, uses the following language:

"If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The actual contract is for the most part entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition, it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party. But we do not see any marked ambiguity in this policy. We repeat the clause, omitting words not essential to its construction on the feature before us. 'If . . . an interest . . . shall exist in favor of a mortgagee, . . . the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.' 'The conditions hereinbefore contained shall apply,' not absolutely, but in a

July, 1901.]

Dissenting Opinion—ANDERS, J.

qualified way, 'in the manner expressed in such provisions and conditions . . . as shall be written upon, attached, or appended hereto;' that is, in order to render the general conditions of the policy applicable to the interest of a mortgagee, there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the 'loss payable clause' nor otherwise by writing upon, attached to, or appended to the policy was there any provision or condition carrying the conditions of the policy into such clause or rendering them in any manner applicable. The authorities cited by plaintiff in error are not opposed to this construction. In some cases the mortgage clause was not executed until after the policy had become voidable, and was then issued without new consideration while the insurer was ignorant of the facts avoiding the policy. In other cases the 'loss payable clause' stood alone without provision in the policy as to its meaning or extent. In this case, in view of the clause in the policy, the 'loss payable clause' must be taken as if it contained an express provision insuring the mortgagee without regard to the conditions imposed upon the owner in the body of the policy."

We hold, therefore, that the plaintiff was the insured under the policy, was entitled to sue upon the policy, and that the subsequent acts of Raub did not affect the policy, so far as Minnie Wegner is concerned. The demurrer to the answer was properly sustained, and the judgment is affirmed.

REAVIS, C. J., and HADLEY, DUNBAR, WHITE and FULLERTON, JJ., concur.

ANDERS, J. (dissenting).—It appears from the record in this case, as stated in the opinion of the majority of this court, that one Andrew Raub was the owner of land upon which was situated a house; that he borrowed \$400 from one Minnie Wegner, and, to secure the payment thereof, executed a mortgage upon the premises, and agreed in said

mortgage to keep said house insured in the sum of \$300, loss, if any, payable to said Minnie Wegner, her heirs or assigns, until the said mortgage was fully paid; that subsequently, and on the date of said mortgage, the appellant insured the said property against loss by fire in the sum of \$300, the policy naming Raub as the insured, and containing the provision, "loss, if any, payable to Minnie Wegner, mortgagee, as her interest may appear;" that subsequently Raub transferred his interest in said property to one Edith Sheridan, without the knowledge of the mortgagee; that the house covered by the policy of insurance was thereafter entirely destroyed by fire, and was of greater value than the amount of the insurance; that no payments have been made upon the said mortgage, and that proofs of loss were offered by said Wegner, but that appellant refused to accept such proofs and to pay said loss; and that said Wegner, thereafter assigned her rights under said policy, as well as her mortgage, to the respondent, who brought this action to recover the amount of the insurance and costs. The facts above stated were substantially set forth in the complaint, and were not denied by the appellant. The policy upon which this action is based provides, in addition to the provision as to the payment of loss, if any, to the mortgagee, above set forth, as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy; or if any change other than by the death of the insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured or otherwise . . . If, with the consent of this company, an interest under the policy shall exist in favor of a mortgagee, or of any person

July, 1901.]

Dissenting Opinion—ANDERS, J.

or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditons hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended thereto . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto."

The appellant in its answer alleges, in effect, among other things, that the respondent's rights under the policy sued on had been forfeited by the sale of the property by Raub, the insured, to Edith Sheridan, and by the procuring of other insurance upon the building by such grantee, without the knowledge or consent of the appellant. A demurrer was sustained to the answer, and judgment entered in favor of the plaintiff (respondent) in accordance with the prayer of the complaint. It is stated in the prevailing opinion of the court that "the questions raised upon this appeal depend upon the question whether Andrew Raub was the insured under the policy of insurance, or whether Minnie Wegner was the insured," and that "the determination of this question must depend upon the construction of the contract of insurance." But, in my judgment, the question whether or not Minnie Wegner was the insured is not now before this court for determination. It was not alleged in the complaint herein that she was the insured. On the contrary, the insurance policy was made a part of respondent's complaint, and it shows upon its face that Raub, and not Wegner, was the insured. The execution of the policy set out in the complaint was admitted by the defendant company, and it therefore follows that there was no ground for controversy upon this question in the trial court. Of course, I do not mean to say, or to be understood as saying, that Minnie Wegner obtained no

rights as against the insurer by virtue of the policy issued to Raub. But I do say that it appears to my mind that the rights she had were not those of a party to the contract between the insurance company and Raub, but simply of a beneficiary thereunder. And her right of recovery, as against the company, upon the policy under consideration, depends, in my opinion, entirely upon the question whether the insured (that is, Raub) could recover if he was suing upon his policy; and, from the undisputed facts in the case, it is plain that he would have had in that event no cause of action against the appellant company.

It is also said in the majority opinion that "the general rule is that when a mortgagor procures a policy of insurance to be issued to himself, loss, if any, payable to the mortgagee as interest may appear, the former is the insured, and subsequent alienation avoids the policy." I do not doubt the correctness of that proposition, for it is in accord with both reason and authority, and I think the rule thus laid down should be applied in this case. If it is not applicable here, it must in some way appear that this case presents an exception to the "general rule," and I am utterly unable to discover that it does. It will not do to say that the company *intended* to insure the interest of the mortgagee in the property described in the policy, in the absence of any statement in the contract or in the record indicative of such intention. It must be borne in mind that no fraud is imputed to appellant in regard to the form or contents of the policy, and that no claim is made that any party interested in it was unaware of its provisions at the time it was issued and delivered; and, its language being plain and unambiguous, there is no reason for invoking any technical rule of construction in order to ascertain its meaning. It must also be borne in mind that the policy in question contains no clause securing the mortgagee

July, 1901.]

Dissenting Opinion—ANDERS, J.

against those acts of the mortgagor, the doing of which, it was agreed, should render the "entire policy" void.

It plainly appears from the record herein that the mortgage clause in the policy of insurance is in the precise form stipulated for by the mortgagee, Minnie Wegner, in her agreement with Raub, which, it is alleged in the complaint, was inserted in the mortgage executed by the latter. If this mortgagee desired to secure herself against the acts of the mortgagor, she could easily have done so by causing a stipulation to that effect to be "written upon, attached, or appended" to the policy, as was done in *Pioneer Savings & Loan Co. v. Providence, etc., Ins. Co.*, 17 Wash. 175, cited by the court. But it is virtually held by this court, contrary to what it declares to be the "general rule," that no such direct stipulation was necessary; that in this instance the mortgagee was secured against the acts of the mortgagor by virtue of the provision in the policy that "if, with the consent of this company, an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured as described herein, the conditions [against alienation, etc.] hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance *relating to such interest as shall be written upon, attached, or appended hereto.*" Now, what condition or provision of insurance *relating to the interest of the mortgagee* was written upon, attached, or appended to the policy? There was none, it will be observed, other than this: "loss, if any, payable to Minnie Wegner, mortgagee, as her interest may appear;" and it does not even purport to *express the manner in which* the provision that "this entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void . . . if any change other than by the death of

the insured take place in the interest, title, or possession of the subject of insurance . . . by voluntary act of the insured or otherwise," shall apply to the "interest" of the mortgagee. And, that being true, I am unable to understand by what course of reasoning or rule of construction it can be said, as the majority of the court say, that "when the company consented to the existence of the interest of Minnie Wegner by recognizing her as mortgagee and payee and delivering the contract to her, and when it said 'the conditions hereinbefore contained shall apply in the manner expressed in such provisions . . . as shall be written upon, attached or appended thereto,' and when in the slip recognizing her as mortgagee and payee no provisions relating to forfeiture were contained, the effect of such action by the company was as though it had said expressly, 'this insurance shall not be invalidated by any act or neglect of the mortgagor of the within described property, nor by any foreclosure nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy, nor by the owner procuring other insurance.' " In my opinion, the mortgage slip attached to the policy amounted to nothing more than a simple agreement that the company might pay the loss, when payable, to the mortgagee for and on account of the insured. In no other respect did it affect, or purport to affect, the contract between the insurer and the insured. This court in its decision seems to have been influenced largely by the opinion of the supreme court of Nebraska in the case of *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717. That case is also reported in 58 Am. St. Rep. 663; and Mr. Freeman, the learned annotator and reporter, says in his note on page 667 that "that case goes to the extreme, if not questionable, limit, in uphold-

July, 1901.[Opinion of the Court—HADLEY, J.

ing the rights of the mortgagee, where there is no clause in the policy securing the mortgagee against any act or neglect of the mortgagor." The mortgage clause in that case was similar to that in the case at bar, but, from a careful consideration of the opinion, I am thoroughly convinced that the decision is contrary to the general current of authority, and should not be followed by this court.

For the foregoing reasons, I am of the opinion that the trial court erred in sustaining the demurrer to the appellant's answer, and that the judgment should be reversed.

[No. 3923. Decided July 8, 1901.]

JOHAN GUNDERSON, *Respondent*, v. OTTO GUNDERSON *et ux.*, *Appellants*.

25	459
129	228
25	459
130	342
25	459
38	379

TRIAL -- NON-SUIT — SUFFICIENCY OF EVIDENCE.

In an action to recover damages for defendant's breach of a contract of maintenance, plaintiff should be non-suited, when his complaint alleges that, by the terms of the contract between them, plaintiff agreed to convey to defendant certain land "by good and sufficient deed," and that "said land was duly conveyed as per said agreement," and the deed offered in evidence showed that the land was presumptively community property, without any joinder by the wife in its conveyance.

LAWS OF FOREIGN STATE — PRESUMPTIONS.

In the absence of pleading and proof that the laws of a sister state are different from our own, they will be presumed to be the same.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Adolph Munter, for appellants.

The opinion of the court was delivered by

HADLEY, J.—Johan Gunderson instituted this action against Otto Gunderson and Annie Gunderson, his wife.

It is alleged that on the 23d day of April, 1898, plaintiff and said Otto Gunderson entered into a contract by the terms of which plaintiff agreed to convey to said Otto Gunderson, by good and sufficient deed, a tract of land situated in Columbia county, in the state of Oregon, and, in consideration of said land being so conveyed, the said Otto Gunderson covenanted and agreed to support and maintain plaintiff from the date of said contract until the death of plaintiff, and that on or about said date said land was duly conveyed in accordance with said agreement. It is further alleged that from the date of said contract to the 14th day of July, 1899, the said Otto Gunderson furnished plaintiff with board and lodging, but that since said last-named date he has failed and refused to contribute in any way to the support of plaintiff; that, by reason of the breach of said contract, plaintiff has been put to an expense of \$150 for his board and lodging since the said 14th day of July, 1899, to the date of the commencement of this action; that plaintiff is of the age of 74 years, and has a reasonable expectancy of life of 6.68 years, and, by reason of the breach of said contract, defendants are further indebted to plaintiff in the sum of \$1,747.20 for his further maintenance. The answer denies that the land referred to was duly conveyed to said Otto Gunderson in accordance with said agreement, and denies that it was conveyed at any time or at all. It also denies that defendants are indebted to plaintiff in any sum whatever for his maintenance and support. There are also some matters of defense alleged affirmatively in the answer, which are denied by the reply, but for the purposes of this opinion it is not necessary to set them out here. A trial was had before a jury, and a verdict was returned in favor of plaintiff for \$1,200. Defendants moved for a new trial, which was by the court denied. Judgment was thereupon en-

July, 1901.[Opinion of the Court—HADLEY, J.

tered in favor of plaintiff for the sum of \$1,200 and costs, and from said judgment the defendants have appealed.

A number of errors are assigned in the brief of appellants, but we will confine our discussion to the third assignment, which is that the court erred in denying appellants' motion for nonsuit. During the introduction of respondent's testimony, he offered in evidence a written instrument claimed to be a deed for land mentioned in the complaint. It purported to convey said land to the appellant Otto Gunderson, and was signed: "Johan Gunderson. Annie Carine Gunderson, by Her Attorney in Fact, Johan Gunderson." The instrument showed upon its face that it was executed in the state of Oregon, and that the land sought to be conveyed was located in said state. No power of attorney is shown in the record, from Annie Carine Gunderson to her husband, Johan Gunderson, authorizing him to execute the purported deed in her behalf. The wife is not named in the body of the deed as being a party to it, and she is not mentioned in the certificate of acknowledgment. Johan Gunderson alone is named as the grantor in the body of the deed, and he alone is named in the officer's certificate as having acknowledged the execution of the instrument. This instrument was offered in evidence in support of the allegation of the complaint that said land was conveyed in accordance with the contract described in the complaint. Objection was made by appellants' counsel to the introduction of this offered instrument for the reason that it appeared that Johan Gunderson was a married man when the instrument was executed; that the land must be presumed to be community real estate, in the absence of a showing to the contrary, and, since his wife had not joined in its execution, it was therefore void, and was not evidence of any consideration for the contract stated in the complaint. It was further urged

in support of the objection that, while it appeared that the land was situated in the state of Oregon, yet, in the absence of averment in the pleading and proof in support thereof to the contrary, it must be presumed that the law of Oregon is the same as our own. The court overruled the objection, and permitted the offered instrument to go to the jury. There was no averment in the complaint concerning the law of Oregon, and no evidence upon that subject. It appears from the record that the theory of the trial court was based upon its construction of the legal effect of certain words in the written contract which called for a deed. The words are as follows:

“Know all men by these presents, that Otto C. N. Gunderson, of the city of Spokane, Spokane county, and state of Washington, for and in consideration of certain lands, to wit, two hundred acres in Columbia county, state of Oregon, being conveyed to him this day by a deed executed, sealed, and delivered to the said Otto C. N. Gunderson by Johan Gunderson, at Portland, Multnomah county, state of Oregon,” etc.

The court construed the above words to mean that the deed of Johan Gunderson alone was required by the contract; that it did not call for any deed from the wife, but one for just what Johan Gunderson could convey for himself; and that, since it appears that the offered instrument conveys all that the contract requires, it is immaterial whether the instrument is an effective conveyance either under the law of this state or that of Oregon. This view of the court seems to be in conflict with the case made by respondent in his complaint. He alleges that he entered into a contract “by the terms of which plaintiff agreed to convey to said Otto Gunderson by good and sufficient deed,” and, further, that “said land was duly conveyed to said Otto Gunderson as per said agreement.” It therefore appears that respondent in his complaint construed his own

July, 1901.[Opinion of the Court—HADLEY, J.

contract to mean that he was obligated to convey "by good and sufficient deed." A good and sufficient deed must be one that will pass title. Under the law of this state, title to community real estate will not pass except by deed in which the husband and wife join. Bal. Code, § 4491. Applying the law of this state to the offered instrument, it was neither in support of the allegation of the complaint that the conveyance was to be by good and sufficient deed, nor of the further allegation that the land had been duly conveyed according to the contract. If the trial should have been governed by the law of this state in this particular, then it was error to admit in evidence the so-called deed, and the motion for nonsuit should have been granted.

This brings us to the further contention of appellants, viz.: that under the pleadings and proofs the court must presume the law of Oregon to be the same as our own. In California the trial court charged the jury as follows:

"The sale relied upon by the plaintiff, Hickman, of a portion of the property in controversy from N. J. Farrens to him took place in Oregon, and without the jurisdiction of the state of California; and therefore the said sale cannot be attacked by the defendant in this cause for an actual or legal fraud provided for by the statute of California relating to fraudulent conveyances."

The court says of the above charge as follows:

"This charge was erroneous. There was no proof made as to the laws of Oregon, and in the absence of such proof the court should have presumed them to be the same as the laws of our own state. This rule applies to the statute law of the state as well as to the common law." *Hickman v. Alpaugh*, 21 Cal. 226, 227.

The same rule has been followed in a number of subsequent California decisions. See *Hill v. Grigsby*, 32 Cal. 56; *Marsters v. Lash*, 61 Cal. 622; *Shumway v. Leakey*, 67 Cal. 458 (8 Pac. 12); *Mortimer v. Marder*, 93 Cal. 172 (28 Pac. 814); *Cavallaro v. Texas & Pacific Ry. Co.*,

110 Cal. 348 (42 Pac. 918, 52 Am. St. Rep. 94). The following cases, with others which might be cited, directly support the same rule: *Bean v. Briggs*, 4 Iowa, 464; *Furrow v. Chapin*, 13 Kan. 107; *Brimhall v. Van Campen*, 8 Minn. 13 (82 Am. Dec. 118); *Rape v. Heaton*, 9 Wis. 328 (76 Am. Dec. 269). The rule is also general that, if one relies upon the laws of a foreign state or country, he must allege in his pleadings and prove as facts what those laws are. *Irving v. McLean*, 4 Blackf. 52; *Mason v. Wash*, 1 Breese, 39 (12 Am. Dec. 138); *Hoyt v. McNeil*, 13 Minn. 390; *Shed v. Augustine*, 14 Kan. 282; *Hosford v. Nichols*, 1 Paige, 220; *Holmes v. Broughton*, 10 Wend. 77 (25 Am. Dec. 536); *Ripple v. Ripple*, 1 Rawle, 386; *Jones v. Laney*, 2 Tex. 342; *Taylor v. Boardman*, 25 Vt. 581; *Hull v. Augustine*, 23 Wis. 383. No attempt was made to plead the law of Oregon as it applies to the subject-matter of this cause, and consequently no proof thereof is in the record. We must, therefore, for the purposes of this case, follow the rule of presumption above announced, and presume that the laws of Oregon governing the property relations of husband and wife are the same as our own. It follows, therefore, that the purported deed conveyed no title, was not evidence of any consideration having passed to appellants in support of the contract sued upon, and was not in support of the allegations of the complaint. The objection to its introduction should have been sustained, and, since this was all the evidence offered to show compliance by respondent with the contract, the motion for nonsuit should have been granted.

The judgment is reversed and the cause remanded, with instructions to the court below to enter judgment of nonsuit and dismissal of the action, with costs taxed against respondent.

REAVIS, C. J., and ANDERS, DUNBAR, MOUNT and WHITE, J.J., concur.

July, 1901.]

Opinion Per Curiam.

[No. 3733. Decided July 10, 1901.]

A. N. BERLIN *et al.*, Respondents, v. A. T. VAN DE VANTER *et al.*, Appellants.

FRAUDULENT CONVEYANCES — EVIDENCE.

In a trial of a claim of title to goods that had been seized under attachment, the court was warranted in withdrawing the case from the jury and entering judgment for plaintiffs, when the only defense set up by the attaching creditors was that the sale to plaintiffs was fraudulent, and the evidence showed that the sale of the goods had been negotiated on Saturday, an inventory of the goods taken and a bill of sale executed on Sunday, and 60 per cent. of the invoice price of the goods paid by plaintiffs on Monday morning after the delivery of the goods to them; there being nothing in the evidence showing that the price was not reasonable, and no evidence of knowledge on the part of plaintiffs of their vendor's fraudulent intent or that he was indebted for anything more than small accounts.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

Allen & Allen, for appellants.

Richard Osborn, for respondents.

PER CURIAM.—In March, 1899, one Vigfussen was a retail merchant in Seattle, and made sale of his stock of goods to the plaintiffs, who were merchants in the town of Kent. The sale between Berlin Bros. and Vigfussen had been negotiated on Saturday. A bill of sale was executed on Sunday, and an inventory of the goods taken on that day, and they were packed and delivered to the railway company for delivery to Berlin Bros. at Kent. On Monday forenoon appellants, Fischer Bros., Lilly, Bogardus & Co., and Hansen, who were creditors of Vigfussen, levied writs of attachment upon the goods so packed. Thereupon the respondents filed their affidavit claiming the goods. At

the conclusion of the trial the court withdrew the case from the consideration of the jury, upon plaintiffs' challenge to the sufficiency of the evidence, and entered judgment for the plaintiffs.

We have examined the evidence, and it appears without contradiction that respondents paid in cash sixty per cent. of the invoice price of the goods sold to them; that the amount paid was \$477.25, which was paid on Monday morning after the delivery of the goods to respondents. There was no evidence offered tending to show that the price paid was not a reasonable one. There is no evidence tending to show that respondents had knowledge that Vigfussen was indebted considerably, or that he owed anything more than small accounts. In fact, there is no tangible evidence of any knowledge on the part of respondents of any fraudulent intention upon the part of Vigfussen, though the haste of the sale and delivery of the goods give rise to suspicion. The only defense offered was that of a fraudulent sale.

We cannot see any error in the court's conclusion, and the judgment is affirmed.

[No. 3254. Decided July 11, 1901.]

WALTER F. MORRISON, JR., *et al.*, Appellants, v. WALTER F. MORRISON, SR., *et al.*, Respondents.

JUDGMENT AGAINST MINORS — VACATION — PROCEDURE.

Under Bal. Code, § 5153, subd. 8, which provides that a judgment may be modified or vacated for error therein shown by a minor within twelve months after arriving at full age, and under § 5157, Id., which provides that "in such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues

25	466
38	390
25	466
39	681
25	466
42	460

July, 1901.]

Syllabus.

be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried," it is not required that the petitioner shall file his motion or petition in the original case, nor is any statutory form of procedure prescribed by such sections which must be strictly pursued.

SAME — PARTIES.

In an action by a minor within one year after attaining majority to vacate a judgment, a sister affected by the same judgment, but who was past the age when she could maintain the like kind of action, and against whom no relief was sought, is not a necessary party to the action seeking to open up the judgment.

PROCESS — SERVICE UPON GUARDIAN OF MINORS — NUMBER OF COPIES NECESSARY.

Service of one copy of summons upon the father, in an action in which his three minor children were defendants, was sufficient, where a copy was left with each of the minors, since the object of the service is notice, and one copy served on the father would answer that purpose as well as an increased number of copies.

WILLS — FAILURE TO MENTION CHILDREN — ADMISSIBILITY OF EVIDENCE TO SHOW TESTATOR'S INTENT.

In an action by a minor within one year after arriving at the age of majority to vacate a judgment awarding all the property of plaintiff's deceased mother to her surviving husband, under a will which failed to mention the children of the testator, the complaint states a cause of action when it alleges that the will made no provision for any of the children, and that oral evidence was received by the trial court for the purpose of showing an intention to omit them, since the admission of such evidence to vary the will constituted error of the trial court.

Appeal from Superior Court, Yakima County.—Hon. JOHN B. DAVIDSON, Judge. Reversed.

Graves & Englehart, for appellants.

Whitson & Parker, Bogle & Rigg, and *Wager & Cameron*, for respondents.

The opinion of the court was delivered by.

MOUNT, J.—Mary L. Morrison died August 18, 1887, being at the time a resident of the territory of Washington. She left surviving her Walter F. Morrison, Sr., her husband, and also Louise Gertrude Morrison, Ethan Allen Morrison, Walter F. Morrison, Jr., and Madeline M. A. Morrison, children by her said husband, and all minors at the time of her death. She left a will by which she bequeathed all her property to her husband, in this language:

“I grant and bequeath unto my beloved husband, Walter F. Morrison, Sr., of North Yakima, Yakima county, Washington Territory, all my property both personal and real.”

The children were not mentioned in the will. The husband was named as executor. In due course this will was admitted to probate, and letters of administration were issued to said executor. After the issuance of letters, the executor, having experienced difficulty in disposing of the property, and being desirous of having an interpretation of the said will which would make it appear valid, filed his complaint in the superior court of Yakima county against the said children, praying that said will be construed. Summons was duly issued and placed in the hands of the sheriff of Yakima county, who made return that he had served each of the defendants personally with a copy thereof, and at the same time and place had delivered a copy of said summons to said Walter F. Morrison, Sr., father of said minors, in whose care and control he found them. Thereupon, after the time for answering had expired, neither of the minors having appeared, the court made an order in which it was adjudged that the minors had been regularly served with process, that they had no other guardian than their father, and that it was neces-

July, 1901.]

Opinion of the Court—MOUNT. J.

sary for the protection of their interests to have a guardian *ad litem* appointed; whereupon such guardian was appointed. He appeared and filed an answer, by which he put in issue all the allegations of the complaint. Trial was had, oral evidence was taken to show that the said children were intentionally omitted by the testatrix, and that said W. F. Morrison, Sr., was entitled to the property by virtue of an agreement entered into by the husband and wife relating to the disposition of their community property, whereby the wife was to make this will in favor of her husband, and her husband was to and did, at or before the date thereof, make a conveyance to her of all the property. Upon oral evidence of these facts, the court in that case made the decree set out in the complaint herein, and all of said property was thereby distributed to Walter F. Morrison, Sr., who thereupon immediately took all of said property into his charge, and has ever since exercised ownership of the same, and withheld from said children the whole thereof. Ethan Allen Morrison has since said time arrived at the age of majority, and within one year thereafter filed his complaint in this action, alleging substantially the foregoing facts, and prays to have said judgment and decree vacated and set aside for errors. A brother and sister who are minors are joined with him, by guardian *ad litem*, as plaintiffs. Walter F. Morrison, Sr., and numerous persons who have acquired interests in the property by purchase since said decree, are made parties defendant. Demurrers to the complaint were filed by defendants upon all the statutory grounds, and said demurrers were sustained, and the complaint dismissed. This appeal is taken from said order of dismissal.

It is conceded by respondents that the lower court has jurisdiction to vacate and modify judgments after the term at which they are rendered, under § 5153, Bal. Code;

but it is contended that the statutory remedy is not only exclusive, but must be followed strictly either by motion or petition in the original case. This contention would undoubtedly be correct if any statutory form of remedy had been provided, but we find no provision of our Code relative to procedure by which a judgment may be modified or vacated for error in a judgment shown by a minor within twelve months after arriving at full age (subd. 8, § 5153), unless it be § 5157, hereinafter referred to. Sections 5154, 5155, and 5156, Bal. Code, provide how and in what time application shall be made under certain specified subdivisions of § 5153, but the 8th subdivision, above quoted, is not included therein. Section 5157 is a general provision relating to proceedings referred to in preceding sections, and is as follows:

“In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried.”

If it be conceded that this section is applicable to the case before us, and prescribes the method and forms of procedure, still no statutory method is here given which modifies the general procedure in any way except in the provision that no answer is required and no new cause may be introduced by defendant. This section specially provides that the pleadings shall be governed by the same principles, and issues made up in the same form as near as can be, as an original action by ordinary proceedings. What is here meant evidently is that the petition or complaint

July, 1901.] Opinion of the Court—MOUNT, J.

must contain a plain and concise statement of the facts constituting the cause by which the judgment or decree is rendered voidable or void, and also the errors complained of, and that such parties may be brought into the action, either plaintiffs or defendants, as may be affected thereby, as is required in ordinary actions. Pleadings directed to the complaint, as to its sufficiency or otherwise, are disposed of as in ordinary actions. In other words, the general form of action may be followed under this subdivision, and it is not necessary to have the same plaintiffs and defendants as in the original action. As was said in *Roberts v. Shelton Southwestern R. R. Co.*, 21 Wash. 427 (58 Pac. 576), "the proceeding . . . is in the nature of an independent action." This was the form adopted in the present action. In this complaint the complaint and decree in the former action are set out *in haec verba*, and the errors complained of are stated substantially as required, and it sufficiently complies with the procedure required to vacate a decree under this subdivision of the statute. The cases of *Long v. Eisenbeis*, 18 Wash. 423 (51 Pac. 1061); *Hawks v. Votaw*, 1 Wash. 70 (23 Pac. 442), and *Davis v. Fields*, 9 Wash. 78 (37 Pac. 281), cited and relied upon by respondents, are not in point here, either in the facts or the principles involved. In *Long v. Eisenbeis* it was sought by bill in equity to vacate and modify a judgment after the year had expired, without any showing why the application was not seasonably made, and the complaint was properly held insufficient. In *Hawks v. Votaw* it was held that where a judgment, erroneous but not void, has been entered against a party, he should either appeal or apply to the court within the time and in the manner prescribed by law to have it set aside. The respondent had not pursued either remedy. In *Davis v. Fields* it was attempted by original action between the

same parties to vacate a judgment in another case because of error of the trial court therein. There was no claim that there was any error against a minor, and the court properly held that such action could not be maintained.

It is next argued that Louise Gertrude Morrison, a party defendant in the original action, is not made a party in this action, and for that reason there is a defect of parties. It appears from the complaint that Louise Gertrude Morrison when this action was commenced was at least twenty-three years of age, or one year past the time when she could maintain this action. So far as the complaint shows, she has no further interest in the litigation, and no relief is sought against her, and she is therefore not a necessary party. The rights of all parties interested may as well be determined without her.

It is claimed by appellants that proper service was not made in the original action upon the minors, because a copy of the complaint and summons for each of said minors was not left with the father, with whom they resided. It appears that a copy was left with each of said minors and one copy with their father. This was sufficient. The object of the service was notice, and one copy answered the purpose as well as any number thereof. *Huggins v. Dabbs*, 57 Ark. 628 (22 S. W. 563); *Richardson v. Loupe*, 80 Cal. 490 (22 Pac. 227); *Rodgers v. Rodgers' Adm'r* (Ky.), 31 S. W. 139.

This court in several cases has held that failure of deceased to mention his children in a will renders such will void as to such children, and that oral testimony that deceased intended to omit them is inadmissible. *Bower v. Bower*, 5 Wash. 225 (31 Pac. 598); *In re Barker's Estate*, 5 Wash. 390 (31 Pac. 976); *Hill v. Hill*, 7 Wash. 409 (35 Pac. 360); *Purdy v. Davis*, 13 Wash. 165 (42 Pac. 520). It is alleged in the complaint that the will made no provision for any of said children, and that oral evidence

July, 1901.] Opinion of the Court—MOUNT, J.

was received by the trial court for the purpose of showing an intention to omit them. The complaint, therefore, stated an error of the trial court, for which a minor, after arriving at the age of majority and within one year, might vacate the same. It was therefore error of the lower court to sustain the demurrer on the ground that the complaint did not state a cause of action. It is true, as said by this court in *Kromer v. Friday*, 10 Wash. 621 (39 Pac. 229, 32 L. R. A. 671), in the absence of fraud or collusion, minors, properly represented, are bound as fully as if they had been majors and personally cited. But this is true only where the parties are all before the court and properly represented, and where the court has jurisdiction both of the persons of the minors and of their property. In the original case the court had jurisdiction of the persons of the minors, but did not have jurisdiction of the property, because the will which gave jurisdiction of the property was void in so far as the interest of these minors was concerned. If the allegations of the complaint are true, the action brought by Morrison, Sr., was evidently intended as an action to make a void will valid by oral evidence explanatory of the conditions which led up to the making of the will prior to the death of the testatrix. This we have seen could not be done.

We conclude, therefore, that the complaint is in proper form; that the court had jurisdiction of the subject matter; that the plaintiffs and defendants are proper parties; that there is no misjoinder; and that the complaint states a cause of action.

The judgment of the lower court will therefore be reversed, and the cause remanded, with instructions to overrule the said demurrer.

ANDERS, DUNBAR, FULLERTON, HADLEY and WHITE, JJ., concur.

REAVIS, C. J. not sitting, being disqualified.

[No. 3734. Decided July 11, 1901.]

ARTHUR E. GRIFFIN, *Respondent*, v. JEROME CATLIN *et al.*, *Respondents*; CRABILL & RICHARDSON, *Appellants*.

NOTARIES — CERTIFICATE OF ACKNOWLEDGMENT — SUFFICIENCY.

The failure of a notary to add to his certificate of acknowledgment of a mortgage a statement of his place of residence is not a material defect such as would invalidate the mortgage as against third parties, when his certificate was regular in all other respects, as required by Bal. Code, § 4533, prescribing the form of certificates of acknowledgment, although § 249, *Id.*, prescribes that "when the notary public shall sign any instrument officially, he shall, in addition to his name and the words 'notary public,' add his place of residence and affix his official seal."

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Allen & Allen, for appellants.

Martin, Joslin & Griffin, for respondent.

PER CURIAM.—Action to foreclose a mortgage upon certain described real estate, executed by defendants Jerome Catlin and Eva Catlin to plaintiff, Griffin, in September, 1895, to secure a promissory note of \$1,600, of even date therewith. The appellants were made parties in the usual allegation of having or claiming some interest in a part of the real estate included in the mortgage. Appellants answered, denying each allegation of the complaint, and alleging that appellants recovered judgment in the sum of \$404.50 against Catlin and wife upon a debt due appellants, and that thereafter an execution was levied upon such judgment against a certain described portion of the real estate included in the mortgage; alleging sale duly made thereunder, and purchase thereof made at such sale by appellants. It is also set up that the mortgage was

executed to plaintiff for the purpose of hindering, delaying, and defrauding appellants and other creditors of the Catlins.

An examination of the record shows that the allegation of fraud was not sustained at the trial. There are but two points made in the argument for appellants: That the mortgage was not acknowledged as required by law, and was invalid; and that the residence of the notary was not added to the certificate,—it was regular in all other respects. The acknowledgment conforms to the form specified in § 4533, Bal. Code, which section declares, "A certificate of acknowledgment, substantially in the following form, shall be sufficient." There are some cases, as *Gates v. Brown*, 1 Wash. 470 (25 Pac. 914), and *Stetson-Post Mill Co. v. McDonald*, 5 Wash. 496 (32 Pac. 108), cited by appellants to sustain their contention, but in those cases the official seal was omitted, which was a material defect. The omission of the notary's place of residence is not a material defect. No error is observed in the decree of the court ordering the sale of the property.

The judgment is affirmed.

[No. 3850. Decided July 11, 1901.]

25	475
34	185

WIRT W. SAUNDERS, *Respondent*, v. UNITED STATES MARBLE COMPANY, *Appellant*.

PLEADING — DUPLICITY — ELECTION OF REMEDIES — ACTION AGAINST CORPORATION.

Where a plaintiff brings suit upon an express contract alleged to have been made with him by a corporation, the fact that he also alleges, by way of ratification and estoppel, the acts of the corporation in accepting and retaining the benefits flowing from such contract would not render his complaint faulty on the ground of duplicity, and subject to a motion for an election of remedies, when there are no specific allegations concerning rati-

fication, acquiescence, or estoppel, and nothing in the complaint to indicate that plaintiff was seeking to recover on those grounds.

CORPORATIONS — ACTIONS FOR BREACH OF CONTRACT — AUTHORITY OF OFFICER — NON-SUIT.

One seeking to enforce the liability of a corporation on a contract alleged to have been made by it should not be nonsuited for failure to show that the contract was authorized by the corporation, when the evidence shows that it was entered into on behalf of the corporation by its secretary and treasurer, who also at the time occupied the position of general and financial manager of the company, and was entrusted by the board of trustees with the general management of its affairs, since the relations of such officer to the corporation and its course of dealing through him raised a question for the jury to determine whether he was authorized to make the contract in controversy.

SAME — FAILURE TO DELIVER STOCK — MEASURE OF DAMAGES.

In an action for damages for breach of contract to deliver shares of stock, a verdict based on evidence showing the actual selling price of the stock about the time of plaintiff's demand for its delivery could not be deemed as awarding excessive damages.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

John C. Kleber, for appellant.

Robertson & Miller, for respondent.

The opinion of the court was delivered by

HADLEY, J.—The material averments of the complaint in this cause are that on or about the 29th day of December, 1897, the respondent, Saunders, entered into a contract with the appellant, the United States Marble Company, a corporation, whereby respondent agreed to procure and to aid in procuring a loan of money to be made to said corporation by some third party, for the use and benefit of appellant, to the amount of \$850; that respondent indorsed a note made by E. C. Nordyke for and on behalf of appellant, and signed by Nordyke as secretary and

treasurer of appellant corporation, as the act of said corporation, for the sum of \$500, payable to the Fidelity National Bank, and upon the credit and indorsement of respondent said sum was procured from said bank; that thereafter respondent procured one D. W. Henley to indorse another note made by the said Nordyke to said bank, upon which said note the further sum of \$350 was advanced to appellant, the respondent agreeing to indemnify said Henley for the said indorsement; that respondent procured the said sum of \$850 for the use and benefit of appellant, and appellant accepted the money so procured and advanced upon the following terms of agreement, to-wit: In consideration of respondent's indorsing and procuring the indorsement of said notes and furnishing said sum of money, the appellant agreed to re-pay the said sum so procured, and, as further consideration for said services on the part of respondent, did sell and agree to deliver to respondent, and cause the proper transfer thereof to be made and entered upon the corporate books of appellant, twenty-five thousand shares of the capital stock of said company, of the par value of \$1 per share, said stock to be delivered to respondent forthwith upon respondent's agreement to procure and to aid in procuring said loan of money to appellant, as aforesaid; that respondent performed all the services required by him to be performed under said agreement, and thereby became entitled to the delivery and transfer of said twenty-five thousand shares of stock; that, notwithstanding respondent has often demanded the transfer and delivery of such stock, yet appellant has wrongfully failed and refused to so deliver and transfer the same, save and except fifteen thousand shares which appellant, under and in accordance with its said agreement, and in part performance thereof, delivered and transferred to respondent; that respondent has frequently demanded the

transfer and delivery of the remaining ten thousand shares of said stock, but appellant has continued to refuse, and still does refuse, to complete the performance of its said agreement. It is averred that there was no market value for said stock at the time said agreement was made, but that the same is now of the value of \$1 per share, and that said ten thousand shares are now of the value of \$10,000; that by reason of appellant's failure and refusal to transfer and deliver said ten thousand shares of its capital stock, and by reason of withholding said stock from respondent, he has been damaged in the sum of \$10,000; and he prays judgment for that amount. The answer denies the material allegations of the complaint, and alleges affirmatively that, if said Nordyke ever made the contract set forth in the complaint, he had no power or authority as such officer or otherwise to make such contract, and that no such contract was ever authorized to be made by the appellant corporation, or was ever made with its knowledge or consent or with its acquiescence; that the secretary and treasurer of said corporation, or either of them separately, under its articles of incorporation and by-laws, or otherwise, have no power or authority, without the special resolution of its board of trustees to that effect, to make any such contract as is mentioned and described in the complaint, and that no such resolution was ever passed by the trustees whereby said Nordyke, as such officer or officers, was ever authorized to make said contract set out in the complaint or otherwise; that appellant never received any benefits of any kind from any such contract as is mentioned in the complaint. The reply denies the affirmative allegations of the answer. A trial was had before a jury, and a verdict was returned in favor of the respondent for the sum of \$5,000. Thereupon the appellant moved for a new trial, which was by the court denied, and judgment

was entered in favor of respondent for \$5,000 and costs. From said judgment the company has appealed.

There are many distinct assignments of error, forty-seven in all, but counsel for appellant have, for convenience, divided them into three groups: (1) Errors of the court in denying the various motions touching the pleadings, for an election, non-suit, judgment, and new trial; (2) errors in the admission and rejection of evidence; (3) errors in giving instructions, and in refusing to give and modifying proposed instructions. Referring to the errors assigned as to the various motions touching the pleadings, we find that the matters mentioned in assignments numbered 2 and 3 cannot be urged as errors, for the reason that an order of the court found in this record granted appellant the relief asked. The court granted those portions of appellant's motion to strike from the amended complaint upon which error is asserted under the two assignments above mentioned. We do not think the other errors assigned as growing out of the motions directed to the pleadings can be said to be more than harmless error. They are not such as affect any substantial right of appellant, and such errors will not authorize the reversal of a judgment. It is next urged as error that the court denied appellant's motion to require respondent to elect upon what cause of action he desired to stand, viz., upon the express contract alleged, or upon the cause of action against the company by estoppel or acquiescence. We have examined the complaint with much care, and we are unable to discover that more than one cause of action is stated therein. The complaint seems to clearly state a cause of action upon an express agreement, as has already been set forth in the statement of the case in this opinion. It is simply stated incidentally that "defendants accepted said sum of money so procured and advanced upon the following distinct terms

and agreement.” The agreement itself is clearly set forth as an express agreement, and in alleging that respondent complied fully with his part of the contract, he shows that he was instrumental in procuring the money and in bringing about its delivery to appellant, and the words above mentioned are the equivalent of an averment that appellant accepted the money in pursuance of the terms of the express contract. It is further averred that plaintiff procured the said money “to and for the use and benefit of defendant corporation, and said loan of said amount of money was made and received by said defendant and applied to its use and benefit; and this plaintiff did in all things and respects fully comply with his said contract with defendant, and duly rendered and performed the services undertaken and agreed by him in said contract to be rendered and performed.” Thus, while it is averred that the appellant applied the money to its use and benefit, it is only a link in the chain of averment by which respondent seeks to show that he has fully complied with his express contract. Perhaps the allegation that the money was applied to the use and benefit of appellant was not necessary to the issue, but there are no specific allegations concerning ratification, acquiescence, or estoppel, and it seems manifest to us that respondent by his complaint was not seeking to recover by way of estoppel of the appellant upon the ground of retention of benefits or subsequent ratification, but solely by reason of his alleged express contract. Since, however, the express contract is made the basis of the action, we see no reason why the subsequent acts of appellant alleged to have been done in pursuance and by reason of such contract were not proper matters for averment, and for the consideration of the jury, as bearing upon the fact of the existence or non-existence

of such contract. We think the motion to require respondent to elect was properly denied under the complaint.

It is next urged as error that the court denied the appellant's motion for non-suit at the close of respondent's case. It is insisted that no authority had been shown for Nordyke to enter into the contract set forth in the complaint, and in support of which evidence had been introduced by respondent. Nordyke testified in behalf of respondent that he entered into the contract for the company, and that he was not only secretary and treasurer at the time, but was general and financial manager of the company. Edwards, who was president of the company at the time the contract was made, testified as follows:

"Question: Did you ever have any conversation with E. C. Nordyke relative to the same? If so, state what it was, where, and what official position you held at the said time.

Answer: I did; in the latter part of December or fore part of January, after the organization, when I was president of the company and he was secretary and treasurer and general manager. The conversation was to the effect that there was a large number of labor liens about to be placed upon the property and that it was a critical time in the financial affairs of the company. Money must be raised at once. That was the reason that he gave; and for that reason I sanctioned as president of the company his action as general manager.

Q. If you were the chief executive officer, how did it happen that Nordyke took this into his own hands?

A. I was about two thousand miles away from the corporation when he took this action as general manager.

Q. When was the office of general manager created?

A. There was no formal entry of the time and fact. It was at the first meeting of the board of trustees.

Q. I have simply asked you when, if there was one created?

A. I think the first of November, 1897.

Q. Was it created by resolution or the by-laws of the company or its trustees?

A. It was created by general consent of the trustees at the first meeting, that Mr. Nordyke should go ahead and be general manager of the business affairs of the company there.

Q. What was the business affairs of the company?

A. To complete and construct a road to reach the quarries of the United States Marble Company, on which we expended about \$5,000, and to open the quarry, and get out material, and to create a market for the material.

Q. So your company had a chief executive and a general manager, did it?

A. Yes, sir; at that time; by consent.

Q. Did the general manager also have the authority to make contracts, issue stock, raise money, and do all the other acts and things the chief executive had the authority to do?

A. No; I will state it in this way—I will make it plain, Mr. Hudson; I don't want to annoy you by trying to evade this question. I stated that we had no by-laws at the meeting of the board of trustees. Formal business was done—in other words, by mutual consent of all the trustees, Mr. Nordyke was selected to take hold, take charge of the business there, which he did in the shape to have the general management of the affairs there; consult with Mr. Kinan and take charge of the meetings of the board—who were there, etc.; that is about what comes into the duties of a general manager. There were no by-laws at that time by which a general manager's duties were prescribed.

Q. Then you probably delegated your authority as president to Mr. Nordyke? That is a fact of the signing, is it not?

A. I don't wish to be understood that way; there was the vice-president there, but at the meetings of the board there would have to be an executive continuously in my absence.

Q. Were you present all the time?

A. After the first meeting, yes, sir.

Q. Did Mr. Nordyke consult with Mr. Kinan on behalf of the corporation, as you have suggested he should have done in regard to this matter of the Saunders' stock? Did he consult with the board?

A. He consulted with them in regard to ways and means, but as to raising money, I could not say.

Q. At that meeting of the board, when this general assent was given, it was under the proviso that he should consult with Mr. Kinan and the board, was it not? As you have just stated?

A. Each of the trustees requested that as I was going away, and had taken charge of matters up to that time, as I had to come to Chicago to raise funds to build the road and to carry on the general business of the company, the general business of the company there was to be in the hands of Mr. Nordyke, who was to be general manager."

In view of the above testimony concerning Nordyke as general manager, we think the rule announced by this court in *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590 (34 Pac. 148), is applicable here. The court in that case, at p. 591, says:

"When a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the company until it has been affirmatively shown by it that as a matter of fact such acts were unauthorized. This is, perhaps, an extension of the general rule, but, in our opinion, such extension is necessary to prevent great hardships being cast upon those who deal with corporations. The very use of the word 'manager' as applied to the officer conveys the idea to the ordinary mind that to one thus named has been committed the management of the affairs of the company. And to hold that one dealing with a person so held out must, before the company can be held liable for his acts, show affirmatively that it had authorized them, would often result in great hardship. The books of many of the smaller corporations are very imperfectly kept, and from them it is sometimes impossible to determine as to just what authority is vested in the manager, and to require of one who

deals with the corporation to show affirmatively the authority thus given would often require of him something that it was next to impossible for him to ascertain. But if we hold that the acts of the person thus held out as manager are *prima facie* those of the company, but that such presumption can be rebutted by affirmative proof on its part that in fact they were unauthorized, it will greatly subserve the public interest and convenience, and at the same time impose no hardship upon the corporation."

A corporation will be prevented from repudiating the acts of its officers within the general scope of their powers, in the absence of fraud on the part of the person seeking to charge the corporation, or of collusion between him or his privies and the officers of the corporation making the contract. 4 Thompson, Law of Corporations, § 5251.

The management of the entire business of a corporation may be entrusted to its president, either by an express resolution of the directors, or by their acquiescence in a course of dealing. *Jones v. Williams*, 139 Mo. 1 (37 L. R. A. 682, 61 Am. St. Rep. 436, 39 S. W. 486).

If this power of general management may be delegated to the president of a corporation, there is no reason in principle why it may not be delegated to another, as it is claimed was done in this case. Nordyke was not only a director of the appellant company, but was its secretary and treasurer, and the president of the company testified that he was its general manager by general consent of the trustees. We think the testimony in this connection was such as, when taken together with other testimony concerning the course of dealing with this corporation and its relations with Nordyke, made it the duty of the court to submit the question to the jury whether Nordyke was authorized to make the contract under consideration. The motion for non-suit was therefore properly denied.

It is also assigned as error that the court denied appel-

lant's motion for an instructed verdict in its favor at the close of the evidence in the case. For the reasons heretofore stated in discussing the motion for non-suit, we think this motion was also properly denied. After the case had passed the motion for non-suit, it became the particular province of the jury to determine the facts under proper instructions by the court, unless subsequent evidence introduced by respondent clearly destroyed the force of his former testimony. Such is not the case in this record.

It is contended that the court erred in denying the motion for new trial, because of errors heretofore discussed, and also because of excessive damages. Referring to the matter of excessive damages, we think the evidence in the record to the effect that stock sold at fifty cents per share near the time the demand for the stock was made at a meeting of the trustees is sufficient upon which to found the amount of the verdict. If respondent was entitled to receive the stock at all, he was entitled to recover by reason of its being withheld from him the amount which he might have realized from it in the market had it been under his control, and such amount is properly determined by evidence as to stock sales actually made.

Numerous errors are assigned upon the rulings of the court during the introduction of the testimony. A reading of the record, however, satisfies us that, upon the whole, no substantial rights of the appellant were prejudiced thereby. To enter into a discussion of the points raised by these various assignments would require much space, and, viewing them as we do, we do not deem such extended discussion necessary.

A number of errors are also assigned upon the instructions given by the court, and also upon the refusal to give, and modification of, proposed instructions. We believe, however, that the instructions clearly and fully stated the

law applicable to the case, and that no reversible error was committed in relation thereto.

The judgment is affirmed.

REAVIS, C. J., and ANDERS, FULLERTON, DUNBAR and WHITE, JJ., concur.

[No. 3882. Decided July 11, 1901.]

EMMA SCOTT *et al.*, Appellants, v. EMMA MATHEWS, Appellant.

Where an intestate died leaving children by two marriages and their mothers surviving him, and where one of the daughters under the first marriage filed a petition by an attorney in fact in the court charged with the distribution of the estate denying both that her sister is a daughter or heir of the deceased, and that their mother is the widow of deceased, and also filed another petition by her attorney alleging that her sister is a legitimate daughter of deceased, and that since the birth of herself and sister her father and mother were duly divorced, and asking that the estate be distributed to herself and sister equally; and where a stipulation was filed in the cause agreeing to the distribution of the estate to the widow by the first marriage and to each of the children under the two marriages, such daughter is estopped from questioning the legitimacy of the children by the second marriage, though she may not have been a party to the stipulation, when she was represented in court and raised no objection thereto while the court and all the other parties were acting thereon for a period of nearly two years prior to the distribution by the court in accordance therewith.

Appeal from Superior Court, Columbia County.—Hon. MELVIN M. GODMAN, Judge. Affirmed.

Sturdevant & Brown and *Edmiston & Miller*, for plaintiffs.

Will H. Fouts, for defendant.

The opinion of the court was delivered by

DUNBAR, J.—It is somewhat difficult to get a concise statement of this case from either the briefs or the record,

July, 1901.] Opinion of the Court—DUNBAR, J.

but, as near as we have been able to ascertain, Thomas A. Wilkes, in 1860, in the state of Illinois, married Harriet A. Goodfellow, by whom he had two children, viz., Florence Wilkes, now Florence Fitzpatrick, and Emma Wilkes, now Emma Mathews. Wilkes abandoned his wife and family in 1862, and never supported them or lived with them thereafter. The wife some years after married a man by the name of Howell, with whom she has since lived. The husband married one Nancy E. Francis, and by her had two children, viz., a son Edgar, and a daughter, Emma, now Emma Scott. It seems that in a few years he abandoned his last family also, and came to the state of Washington, where he accumulated an estate in Columbia county worth several thousand dollars, and where he died intestate on the 5th day of July, 1897. One W. E. Cahill was appointed administrator of the estate, and on October 12, 1898, Harriet A. Howell filed her petition, alleging, among other things, that she was the widow of deceased; that Florence Fitzpatrick and Emma Mathews were daughters of herself and deceased, and his heirs at law; and praying that his estate be distributed to herself as his widow, and her said daughters as his heirs at law. On the same day Florence Fitzpatrick filed her petition, alleging, in substance, the same as the petition of her mother. On the 16th of November of the same year Emma Scott filed a petition alleging that she was the daughter of the deceased; that Edgar Wilkes was a son of the deceased, and that Emma Mathews was a daughter of the deceased, and that these children were all the children and heirs at law of the deceased; denying that Florence Fitzpatrick was a daughter of the deceased, and that Harriet A. Howell was the widow of the deceased; and praying that the estate be distributed to herself, Edgar Wilkes, and Emma Mathews. Shortly after this a stipulation was filed to the effect

that the estate should be distributed, one-half to Harriet A. Howell, and one-eighth to each of the other petitioners, viz., Florence Fitzpatrick, Edgar Wilkes, Emma Scott, and Emma Mathews. The proceedings were continued from time to time for nearly two years, when, upon the pleadings and testimony introduced, the court awarded the estate one-half to Harriet A. Howell, and the other half equally to Florence Fitzpatrick, Edgar Wilkes, Emma Scott, and Emma Mathews. Emma Mathews appeals from the judgment of the court finding that Edgar Wilkes and Emma Scott were heirs at law to the estate, and Emma Scott, Edgar Wilkes, Florence Fitzpatrick, and Harriet A. Howell appeal from the judgment of the court holding that \$1,040, which had been advanced to Emma Mathews, was not a claim of the estate against Emma Mathews, but was a gift from the deceased to the said Emma Mathews.

It is contended by the appellant Emma Mathews that Edgar Wilkes and Emma Scott are illegitimate children of the deceased, and therefore cannot heir any portion of his estate; that the deceased was never divorced from his first wife, Harriet A. Howell; and that his marriage, if there was one, with his second wife, Nancy E. Francis, was illegal and void. It would not benefit any one to enter into an analysis or discussion of the testimony, which is comprised largely of criminations and recriminations of contending relatives. We think the court was justified in concluding that Emma Mathews was estopped from raising the questions that she raises here. In the first place, while not a party to the stipulation mentioned above, she was represented in court, and raised no objection to the stipulation upon which the court and all the other parties were acting and had been resting for nearly two years. Again, her principal contention as to the illegitimacy of Edgar Wilkes and Emma Scott is based upon the fact that her

July, 1901.] Opinion of the Court—DUNBAR, J.

father had never been divorced from her mother, Harriet A. Howell, and yet, on the second day of April, 1900, appearing by her attorney in fact, Frank P. Hunston, she files a petition denying that her mother, Harriet A. Howell, is the widow of the deceased, or entitled to any interest in the estate, and denying that Florence Fitzpatrick, her sister, is a daughter or heir at law of the deceased, or entitled to heir in the estate, and prays that neither Harriet A. Howell, Florence Fitzpatrick, Edgar Wilkes, nor Emma Scott receive or have distributed to them any share or interest in the estate. On the same day, appearing by attorney, Will H. Fouts, she alleges that Florence Fitzpatrick is a legitimate daughter of the deceased, and alleges positively that since the birth of Florence Fitzpatrick and herself the said Thomas A. Wilkes and his wife, Harriet A. Howell, were duly divorced by the circuit court of Cook county, Illinois, a court having jurisdiction to grant divorces, and asking that the estate be distributed to herself and her sister, Florence Fitzpatrick, equally. Considering the contradictory statements made by the petitioner, and the fact that she alleges—doubtless for the purpose of preventing her mother from heiring any portion of the estate—that her mother and father were divorced, we think she ought to be estopped from raising these questions. In addition to this, there was some slight testimony tending to show a divorce of the decedent from his first wife, who evidently acted upon the theory that he was divorced when she married the second time; and, if she did not, she was informed afterwards by the decedent of his conjugal relations with his second wife. We think there was sufficient testimony shown by the record, considering the testimony and the petition which was a pleading in the case, to warrant the court who tried the cause in coming to the conclusions which it did in the distribution

of the estate. We think also that the court properly found that the \$1,040 had been advanced as a gift by the deceased to his daughter Emma Mathews.

No appeal is taken from the judgment in favor of Harriet A. Howell, and no claim was presented by the second wife.

Under the pleadings and proof, the judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT, HADLEY and WHITE, JJ., concur.

[No. 3696. Decided July 12, 1901.]

E. W. MCGINNIS *et ux.*, *Appellants*, v. H. GENSS *et ux.*,
Respondents.

UNLAWFUL DETAINER — NOTICE TO QUIT — SUFFICIENCY.

Under Bal. Code, § 5527, which provides that a tenant is guilty of unlawful detainer, "when he, having leased real property for an indefinite time, with monthly or other periodic rent reserved, continues in possession thereof after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period," notice served just twenty days prior to the end of the month or period, excluding the day of service, is sufficient.

Appeal from Superior Court, King County.—Hon. Orange Jacobs, Judge. Reversed.

Preston, Carr & Gilman, for appellants.

Fred H. Peterson, for respondents.

PER CURIAM.—Plaintiff E. W. McGinnis, some time prior to the first day of January, 1900, rented to respondent H. Genss certain premises in the city of Seattle. The renting was for an indefinite time, with monthly rent reserved, the same being payable monthly on the first day of each and every month. Plaintiff concluded to terminate

July, 1901.]

Opinion Per Curiam.

the tenancy on the first day of February, 1900, and on the 11th day of January served upon defendant a notice to quit. Defendant refused to comply with the notice, and this action was commenced. A demurrer was interposed to the complaint, and sustained by the court, and judgment for defendant entered thereon.

The only question presented is the sufficiency of the notice. Section 5527, Bal. Code, reads:

“A tenant of real property for a term less than life is guilty of unlawful detainer either. . . . 2. When he, having leased real property for an indefinite time, with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice (in manner in this chapter provided) requiring him to quit the premises at the expiration of such month or period;”

Respondents contend that, as the notice was served on the 11th of January, terminating the tenancy on the 31st of January, the service was just twenty days prior to the end of the month, and the statute requires that notice be served more than twenty days prior to the end of the month. This contention cannot be maintained. The notice was to terminate at the end of the month ending January 31st. It was served on the 11th day of January. Including the day of service and excluding the last day of the month, there would be at the end of the month of January twenty days. The tenancy did not terminate until the end, and at the end of the twentieth day the next moment would be “more than twenty days.” The word “more” does not add any additional time to the twenty days, but merely designates the complete expiration of that number of days. We think the notice was sufficient, and the judgment is reversed, with direction to overrule the demurrer.

[No. 3707. Decided July 12, 1901.]

GALUSHA PARSONS *et al.*, Appellants, v. TACOMA SMELTING
AND REFINING COMPANY *et al.*, Respondents.

CORPORATIONS — ACTS OF TRUSTEES — WHEN VOIDABLE AT SUIT OF
STOCKHOLDER.

The action of a majority of a board of trustees is voidable upon the complaint of a stockholder, where the vote of a trustee interested adversely to the corporation was necessary to effect such action; and Bal. Code, § 4257, which provides that "a majority of the whole number of trustees shall form a board for the transaction of business and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act," is inapplicable in such cases, since the policy of the law forbids a trustee to assume a double function where there are adverse interests to be considered.

SAME — ACTS IN EXCESS OF CORPORATE POWERS — VOIDABLE, AL-
THOUGH AUTHORIZED BY MAJORITY OF STOCKHOLDERS.

The articles of incorporation of a corporation constitute a contract entered into by all the stockholders, whose terms cannot be abrogated without the consent of all; hence a lease of the corporate property authorized by a majority vote of the stockholders is voidable at the suit of a non-consenting stockholder, where the articles of incorporation contain no express power to make such lease.

SAME—CAPITAL STOCK—OWNERSHIP BY ANOTHER CORPORATION.

One corporation cannot acquire the right to purchase and hold stock in another corporation merely by expressing such power in its articles of incorporation, where such ownership of other corporate stock is not expressly authorized by statute.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Reversed.

Parsons, Parsons & Parsons, for appellants.

J. M. Ashton, W. O. Chapman and W. L. Sachse, for
respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Appellant Parsons, original plaintiff, brings suit as a stockholder of the Tacoma Smelting & Refining Company against the corporation and the trustees thereof and the Tacoma Smelting Company, a corporation. The other appellants intervened, likewise as stockholders, and united with the plaintiff. Appellants, as minority stockholders of the Tacoma Smelting & Refining Company, pray the cancellation of a lease executed by the Tacoma Smelting & Refining Company to the Tacoma Smelting Company. Their complaints allege substantially that the meeting of trustees who resolved upon the execution of the lease did not have a legal quorum of the board present to adopt the resolution; that a majority of the stock of the Tacoma Smelting & Refining Company had, in fact, been transferred to the Tacoma Smelting Company, and was controlled in the interest of the latter company; that at the stockholders' meeting where the trustees were authorized to execute the lease the majority of the stock was controlled by the Tacoma Smelting Company, and voted by a trustee of that company, who was also trustee of the Tacoma Smelting Company; that by the execution of the lease the Tacoma Smelting & Refining Company ceased to perform the functions for which it was organized. After issue joined by the respondents, a trial was had, and a decree followed, dismissing the action. No special findings of fact were made by the superior court. Upon an examination of the facts admitted in the pleadings and shown by the testimony at the trial, so far as deemed material to state, it appears that the Tacoma Milling & Smelting Company was organized under the laws of this state in Pierce county, in 1887, with a nominal capital of \$1,000,000. Before commencing business, however, in March, 1890, it amended its articles of

incorporation, and changed its name to the Tacoma Smelting & Refining Company, and made a board of seven trustees. Under the latter name it opened stock subscription books, and the whole amount of the capital stock, \$1,000,000, was subscribed. There was, however, an agreement made among the subscribers that the stock should be paid for at 50 per cent. of its par value. Therefore a smelting plant had been erected about seven miles from the city of Tacoma by other parties, and the plant was sold to the corporation for the sum of \$375,000, and paid for in capital stock at 50 per cent. of its par value. Respondents Browne and Oakes were respectively elected trustees and president and vice president, and Rust was employed as manager at a salary of \$8,000 per year. He was also secretary and a trustee during all the times mentioned thereafter. A Mr. Clark was assistant at a salary of \$3,600 per annum, and Mr. Daly at a salary of \$2,400. In December, 1898, four of the trustees of the Tacoma Smelting & Refining Company—Browne, Oakes, Rust, and Anderson—met, and resolved that it was for the best interests of the corporation to lease all its plant and properties for the period of ten years for the annual rental of \$5,000, and the payment of taxes, and advancing funds to take up the indebtedness of the company, which was about \$50,000. The proposal to make a lease had come through Mr. Rust from a Mr. Perkins, of San Francisco, and, in substance, it was that Mr. Perkins would form an incorporation which should lease all the property of the Tacoma Smelting & Refining Company, and pay the rental as mentioned, if he (Perkins) or the new company could have an option for 18 months to purchase three-fourths of the capital stock of the Tacoma Smelting & Refining Company at \$25 per share. This proposition was submitted by the board of trustees to the stockholders

of the corporation at a meeting called in December, 1898, at which was represented a majority of the capital stock. At such meeting of the stockholders the proposal to execute the lease submitted by the trustees was approved by a majority of all the stockholders, and thereafter the trustees executed the lease in question. The lease was executed on the 6th of December, 1898, and included all the properties, smelting plant, buildings, machinery, and all property of every description, whether real, personal, or mixed, belonging to the Tacoma Smelting & Refining Company, and also included a provision for purchasing all ore and finished products and supplies then on hand, at its market value, to be thereafter inventoried and appraised, and for which \$30,000 was afterwards paid in settlement of the lessor's liabilities. The lessee also covenanted that within six months it would expend at least \$30,000 in making improvements and betterments on the smelting plant; that it would pay \$5,000 per annum rental, together with taxes, insure the property, and at the end of the term return the property in as good condition, wear and tear excepted, as when received. The resolution of the meeting of the stockholders of the Tacoma Smelting & Refining Company recites as reasons for the execution of the lease that the corporation was without sufficient capital to conduct its business at a profit, or in such a manner as to pay its operating and incidental expenses without drawing upon its capital, and that it was compelled to liquidate its affairs unless capital could be raised; that it had made diligent efforts to raise such capital, without success, until recently, when, through the manager, Mr. Rust, it had been able to arrange so that the business of the company could be continued, and the plant and property of the company preserved and maintained in good order and condition, upon the terms mentioned in the lease. The original plaintiff,

who was the owner of 150 shares of capital stock, appeared at such meeting, and protested against the execution of the lease on the ground that the company could not make such lease against the objection of a minority of its stockholders, and that such lease was against the best interests of the company and that of its stockholders; and a similar protest was made to the board of trustees before the execution of the lease. Prior to the execution of the lease the properties were under the management and in the possession of Mr. Rust and his assistants, under the direction of the trustees. The same managers remained, and are now in possession under the new company. It appears that prior to the execution of the lease the proposal of the new corporation to hold an option on three-fourths of the stock in the old corporation was superseded by the purchase of a majority of the stock in the old corporation at \$15 per share, and the day after the execution of the lease the stock so purchased was entered upon the books of the new corporation, the Tacoma Smelting Company, as owned by the corporation. A large portion of this stock represented by Mr. Rust as trustee was voted at the stockholders' meeting of the old corporation when the trustees were authorized to execute the lease. Mr. Rust was the only witness who testified. He detailed the history of the old corporation. About 1892-93 it sustained considerable losses because of falling values in silver and lead. What the aggregate losses were is not stated with precision, but the company had borrowed about \$50,000, for which it was liable, and it had no funds on hand. It appears that the operating expenses and salaries during the time had been paid.

1. At the trustees' meeting there were present four of the board of seven,—Anderson, Oakes, Browne, and Rust,—of whom Rust was a promoter and trustee of the new corporation, and controlling a majority of the stock in the old company. Section 4257 Bal. Code, declares:

“A majority of the whole number of trustees shall form a board for the transaction of business and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act.”

It is maintained by counsel for respondents that the statute makes every act of a majority of a quorum, when assembled, valid, and that the statute is merely confirmatory of the existing rule at common law. This view of the validity of such action seems to omit a consideration of the trust held by the director. Each occupies a fiduciary relation to the corporation and to each stockholder. He must faithfully perform his trust. The ordinary obligation attending trust relations attaches to the trustee of a corporation. The policy of the law forbids a trustee to assume a double function where there are adverse interests considered. 1 *Waterman, Corporations*, p. 612, observes that they cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the profits. *Morawetz on Corporations* lays down the rule that the utmost good faith is required in the exercise of the powers conferred on trustees. In *Munson v. Syracuse, etc., R. R. Co.*, 103 N. Y. 58 (8 N. E. 355), the court observed of a contract:

“But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. There is no controversy as to the facts bringing the case as to *Munson* within the operation of the rule. He and his associates were dealing with a corporation in which *Munson* was a director, in a matter where the interests of the contracting parties were or might be in conflict. The contract bound the corporation to purchase; and *Munson*, as one of the directors, participated in the action of the corporation in assuming the obli-

gation, and in binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair."

In *Curtin v. Salmon River, etc., Ditch Co.* 130 Cal. 345 (80 Am. St. Rep. 132, 62 Pac. 552), it was held that where, at a meeting of the directors of a corporation, a quorum being present, the execution of a mortgage on the property of the corporation was voted to one who constituted one of the quorum, the mortgage was invalid, because, the mortgagee's interest being antagonistic to the corporation, he was not a part of the board as concerned the mortgage, and hence there was not a quorum of the board present and acting. This conclusion was approved by the same court in *Bassett v. Fairchild*, 132 Cal. 637 (64 Pac. 1082). It was there observed of a resolution of the board of directors of a corporation allowing compensation to one of the board:

"In the opinion delivered in department it was held that the allowance of Fairchild's claim by the board of directors on November 9th was valid, notwithstanding the fact that the presence of Fairchild was necessary to constitute a quorum, and that, at all events, the allowance was an act that could be ratified by the stockholders, and that it was so ratified on January 10, 1893, as above stated. Since then it has been held in *Curtin v. Salmon River, etc., Ditch Co.*, 130 Cal. 345 (80 Am. St. Rep. 132, 62 Pac. 552), that there is no legal quorum of directors present when action is attempted to be taken on a matter as to which one of the directors necessary to make the quorum is interested."

While there are observations by some of the text writers and expressions in some judicial opinions refining upon acts which may be merely voidable, and not *per se* void,

where an interested trustee's vote is necessary to adopt, we think on principle, and in the better-considered cases, such acts, when consummated by the necessary vote of the interested trustee, are voidable upon complaint of a stockholder. It is not deemed necessary to determine further what weight the resolution of the majority of the stockholders and the subsequent declination of a legal quorum of the board of directors to refuse to continue the lease may have towards establishing the ratification of the resolution to lease.

2. The objects of the incorporation of the Tacoma Smelting & Refining Company are stated in its articles to be the building, acquiring, owning, and constructing and operating of works and buildings for the purpose of milling, reducing, smelting, and refining gold and silver ores, purchasing and handling of such ores, advancing moneys thereon, and acquiring, purchasing, owning, and operating of such appliances and adjuncts as may be necessary or convenient for the prosecution of the business; the purchasing, owning, and acquiring of mines and all other lands that may be necessary or convenient in operating said business; and generally to do all other acts which, in the judgment of the trustees, may be proper or essential to the successful carrying on of the purposes and objects of the corporation. It is apparent that no express power to lease all the property of the corporation is contained in the articles. The articles of incorporation, as observed, are a contract. Each individual stockholder assumed the liability of the payment of his subscription to the capital stock in money or money's worth, and the corporation engages to carry on the business for which it is organized. Its business is managed by the board of trustees, but always within the fundamental limitations of the articles of incorporation. Morawetz, *Private Corporations*, § 511, observes:

“The authority of the board of directors is derived from the unanimous agreement of the shareholders, expressed in their charter or articles of association; and hence those powers which it is intended shall belong to the directors exclusively cannot be impaired by the majority, or any other agent. Each agent is supreme within the scope of the powers delegated to him by his principal. . . . A lease executed in pursuance of a resolution of the shareholders of a corporation was void, because the power of managing the business of the company was vested solely in the board of directors.”

The stockholders have equal rights to participate in the profits of the business according to the value of the stock owned by each, and each stockholder is entitled to the protection of his charter rights. He may insist that the business be conducted according to the articles; and, while the wishes of the majority of the stockholders are potent in the administration of all the business of the corporation, and, where exercised without fraud or oppression, are controlling upon the minority, yet the action of the majority cannot prevail where it impairs the contract right of a stockholder. The reasons urged for the necessity of the lease in question are that the Tacoma Smelting & Refining Company was unable to procure capital to conduct its business efficiently; that it had liabilities which were pressing, and had no available funds to make payment. It may be well to suggest an inquiry into the condition of the corporation at the time the proposal to lease the property was made. It had a plant of considerable value. It apparently exceeded in value the liabilities, and, while the amount is not definitely shown, it appears that a large portion of the subscriptions to the capital stock had not been paid. Mr. Rust testified that some of the subscribers to the capital stock had been requested to advance capital to conduct the business, but that no such advancements had been made. It is nowhere intimated that the board of trustees had

attempted to exercise its appropriate powers to collect the unpaid subscriptions to the capital stock. In fact, it would seem, from the reasons suggested in the resolution adopted by the majority of the stockholders, that they did not desire this capital stock to be drawn upon in the prosecution of the corporate business. It cannot be concluded from the record before us whether other action by the board of trustees might not keep the corporation a going concern, and enable it to perform the objects of its organization. It may be implied from the testimony that a cogent reason for the action of the trustees was the enlargement of the smelting business by the organization of a new corporation, which should include within it the promoters and members of several large mining companies, so that the product of those mines could be brought to the smelter, and a much larger business established. The promoters of the new corporation and of the lease evidently desired to secure control of the stock in the old company. The acceptance of the lease seems to have been upon condition that the new company acquire a majority of the stock. It is urged that under the circumstances surrounding the transaction the trustees had the power to execute the lease. The authorities cited by counsel for respondents have been examined, and those most pertinent will be considered. In *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521 (61 Am. St. Rep. 57, 38 Atl. 45), it was held that a manufacturing corporation organized under the joint-stock laws of Connecticut, located in the state, being unable to raise the capital necessary to continue its business with profit, might lease its plant for a term of ten years, with the privilege of purchase, and where it appeared that such lease was made in good faith, and was approved by a large majority of the stockholders, and contemplated the continuance of the same business under the lessee's management.

The suit was by a minority of the stockholders to annul the lease. The lease there seems to have been upheld upon the ground that the contract contained an option to the lessee to become the purchaser of the property, and the court held that it was competent for a business corporation to sell its property, pay its debts, divide its assets, and wind up its affairs. The case of *Hennessy v. Muhleman*, 57 N. Y. Supp. 854, was that of a corporation organized under the laws of West Virginia, and the purposes were acquiring and holding by purchase, lease, or otherwise mineral land and other property on Baranoff Island, Alaska, and elsewhere in the United States and territories, and it was held that the directors of the corporation had the power, without the unanimous consent of the stockholders, to lease the entire property of the corporation in consideration of a fixed rental and a certain portion of the metals mined on the lands. But the court observed:

“In the case now under consideration, the corporation was organized, not for the exclusive purpose of mining, as seems to have been assumed by the learned justice, but, as its charter declares, for the purpose of ‘acquiring and holding, by purchase, lease, or otherwise, mineral land and other real property, . . . and to mine, transport, and dispose of the mineral and other products of such lands.’ The company has acquired, and is now holding, by purchase, mineral land and other real property; and, while its charter permits it to conduct mining and other enterprises, there is nothing in the charter which makes it necessary that the company itself should do the mining, or that it should be done under its direction. . . . It has not disposed of its property, nor has it suspended the active life of the corporation.”

Ardesco Oil Co. v. North American Oil & Min. Co., 66 Pa. St. 375, was an endeavor to avoid a contract, and the court merely observed:

“The remaining errors complained of in the sixth and

seventh assignments may be considered together, namely, that the directors of the corporation, plaintiffs, had no power to make the lease sued on. It is supposed that a company chartered for the purpose of manufacturing and refining oil cannot lease its entire property and so defeat the very purpose for which its charter was granted. But corporations, unless expressly restrained by the act which establishes them or some other act of assembly, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter. *Dana v. The Bank of the United States*, 5 W. & S. 223. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation. *Omne majus continet in se minus.*"

Another and well-considered case is *Plant v. Macon Oil & Ice Co.*, 103 Ga. 666 (30 S. E. 567). This was a suit by minority stockholders to prevent the corporation from carrying into effect a lease of all its property and franchises for the term of one year. It was shown there that the Macon Oil & Ice Company was in failing condition, and liabilities were pressing for payment; that among the claims was one for ground rent, which was vigorously pressed; that it was absolutely impossible to run the oil mill; that the lease was temporary, in order to secure money with which to meet pressing claims; that the lease was under profitable terms to all the stockholders; that it was made solely for the purpose of relieving the company of temporary embarrassment; and that the manager of the Macon Oil & Ice Company was to remain at the company's office, and supervise its property, and look after its interests while paid for his services by the lessor. The court observed:

“Reason, as well as authority, we think, will sustain the position that neither a majority of stockholders nor the directors of a corporation as such, without special authority for that purpose, can generally do an act which, to all intents and purposes, terminates the corporation; that they could not, for instance, while the company was in a prosperous condition, upon their own mere caprice, sell out the whole source of their emoluments and abandon their enterprise, where a minority desire a prosecution of the business. . . . Upon a cursory glance at the authorities above cited, and a number of others we have investigated upon the subject, there would seem at first to be an irreconcilable conflict upon the powers and rights of a majority and a minority of stockholders in a private corporation, touching its authority to alienate or lease its property and franchises. But we think that nearly if not quite all of the authorities upon the subject can be reconciled, and that from a careful consideration of all of them together can be deduced the following principles: . . . (2) But a private corporation, limited as to duration, while doing a successful business, cannot sell out and abandon its enterprise, over the protest of a minority of its stockholders, who have the right to insist upon a continuance of its business. (3) While a minority of stockholders have the right recognized in the paragraph just above, it cannot compel a majority to continue indefinitely in the business of the corporation, provided a majority, in arrangements to discontinue the business, fully protect the interests of the minority by payment in full of the value of their shares, should it be demanded.”

And the court observed, with reference to the contention that the right to rent for one year would involve the right to rent indefinitely, and thus permanently transferring the business, that, “should a scheme of this sort in the future be attempted without the necessity for such alienation, plaintiffs could doubtless then have redress of their grievances.” But, on the other hand, there are well-adjudged cases holding that a lease of all the property of a corporation cannot be made. That the stockholders can-

not make such lease is ruled in *Copeland v. Citizens' Gas Light Co.*, 61 Barb. 60. In *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264 (47 N. W. 797), the Minneapolis Company leased its property to the Electro-Matrix Company to carry on the same business, and the lease was ratified by a majority of the stockholders. The court observed:

"We do decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is to still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a nonassenting stockholder arising from the contract, implied, if not expressed, in the creation of such an organization, and he would be entitled to have such acts restrained by injunction."

The same declaration is made in *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455. In *Byrne v. Schuyler Electric Manufacturing Co.*, 65 Conn. 336 (31 Atl. 833), a corporation was organized for the purpose of succeeding to and carrying on the business of an insolvent corporation. The court declared that this could not be done; that such a transfer would be sustained only when the purpose was a *bona fide* winding up of the business of the existing corporation, and that any dissenting stockholder could maintain an action to enjoin such a disposition of the corporate property. A distinction may be observed between a sale of all the property and a lease of all the property. In that of a sale no further liability rests upon the stockholder. The corporation is in fact discontinued. In that of the lease the business is discontinued, and the profits derived by the lessee, but the stockholders' obligations may continue. Under our statutes the corporate existence is limited in time. This was not usual in the older cases. And, further, § 4275, Ballinger's Code, contains the com-

plete procedure for the dissolution of the corporation at the will of two-thirds of the stockholders. These statutes apparently contemplate the conduct of the business for which the corporation is organized through its own appointed agencies, or, at the choice of two-thirds of the stockholders, a dissolution. It is true, an insolvent corporation may make an assignment for the benefit of its creditors against the will of a nonconsenting stockholder, and probably any appropriate proceedings in equity might be taken to relieve a failing corporation by such disposition of its property as should be equitable, which did not violate any contractual relations of the stockholders. It is concluded upon the whole record presented here that the lease in controversy is voidable at the suit of a nonconsenting stockholder.

3. As has been observed, the new company holds a majority of the stock of the old company. Some confusion arises upon the investigation into the right of one corporation to hold stock in another, or become a member thereof, when the inquiry is made into prohibitions upon the powers of a corporation, rather than directed to the enumeration of powers conferred upon it. It has always been true that corporations have only such powers as are granted to them by the state, and, when a corporate act is questioned, the affirmative is upon the corporation to show its authority. It is not entirely correct to draw a right line between corporations which are *quasi* public and another class designated as private. The state will more readily interfere, perhaps, when the duty of a corporation is public than when it is merely a trading, or manufacturing, or commercial company; but we apprehend that the rights of stockholders are equally protected in both. It was said by this court in *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 179 (60 Pac. 141):

“It may also be further observed that a corporation cannot enlarge its powers beyond legislative grant by any statement in its articles of incorporation. The corporation may be differentiated from the natural person thus: The natural person may make any contract or do any business not inhibited by law or public policy. The corporation cannot make any contract or do any business except as authorized by legislative grant.”

Morawetz, *Private Corporations*, § 431, says:

“A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. Nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its own proper business.”

And in § 434 it is further said:

“Shares in a corporation, which have been purchased by the company itself, either in its own name or the name of a trustee, cannot be voted on by either the trustee or the company’s officers.”

Thompson, *Corporations*, § 6405, states the rule:

“One corporation has no power, in the absence of an express grant, to purchase the shares of another corporation for the purpose of owning, possessing, and controlling its property and business.” Where such corporations have such power, he says, they hold such shares “only as the owners of paper securities, and not as stockholders or corporators in the corporation whose shares they are; and, consequently, they do not acquire the right to vote in respect of such shares at corporate elections. In the absence of an enabling statute, authorizing the formation of a corporation with such powers, it cannot acquire them merely by assuming them in its articles of incorporation.” In *First National Bank v. National Exchange Bank*, 92 U. S. 122, it was said:

“Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power.”

See, also, *California Bank v. Kennedy*, 167 U. S. 362 (17 Sup. Ct. 831); *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350 (38 Am. Rep. 594); *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268 (17 Am. St. Rep. 319, 22 N. E. 798). It was determined by this court in *Denny Hotel Co. v. Schram*, 6 Wash. 134 (32 Pac. 1002, 36 Am. St. Rep. 137), that a corporation could not subscribe for the capital stock of another. Our statutes cannot be said to authorize such ownership of stock any more than the authority to subscribe for capital stock. The expression of such power in the articles of incorporation of the new company, as has been observed, cannot extend the corporate powers beyond those expressed in the statutes. It appears that appellants are entitled to have the lease adjudged void, and, further, that the stock of the Tacoma Smelting & Refining Company owned by the new company shall not be used in voting at stockholders' meetings in the old company.

The judgment is reversed, with direction to the superior court to adjudge the lease void, and that it be canceled, and that the Tacoma Smelting Company be enjoined from voting the stock held by it in the Tacoma Smelting & Refining Company.

DUNBAR, FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3192. Decided July 13, 1901.]

M. GOTTSTEIN *et al.*, Appellants, v. P. H. HARRINGTON *et al.*, Defendants; GEORGE A. THAYER *et al.*, Respondents.

ATTORNEY AND CLIENT — LIEN UPON PAPERS — WAIVER.

Under Bal. Code, § 4772, which provides that an attorney has a lien for his compensation upon the papers of his client, which

July, 1901.] Opinion of the Court—ANDERS, J.

have come into his possession in the course of his professional employment, no right of action is given the attorney to enforce such lien, but he is merely entitled to retain such papers until paid, and where he parts with possession, even that right is waived and relinquished.

MORTGAGES — ASSIGNMENT — NOTICE.

Under Bal. Code, § 4565, which provides that any person to whom any real estate or chattel mortgage is given, or any person to whom such mortgage has been assigned and who has recorded the assignment in the office of the county auditor wherein such mortgage is of record, may satisfy and discharge the same of record, a purchaser is not required to make inquiry beyond the records of the county auditor's office, and where without notice of an outstanding unrecorded assignment he purchases the mortgaged property for a valuable consideration on the faith of a satisfaction by the mortgagee on the records, he obtains a clear title thereto.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Brady & Gay and *Milo A. Root*, for appellants.

Allen & Allen, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This action was brought by appellants to set aside a satisfaction of record of a certain chattel mortgage, to reinstate the said mortgage, and to foreclose the same, and sell the property covered thereby to satisfy an alleged attorney's lien on said mortgage and said property, and the amount due appellants from defendants Harrington and Daw, on an open account. The facts and circumstances, as presented in the record, are substantially as follows: Messrs. Brady & Gay and Milo A. Root, as attorneys, were employed by defendant Frank Daw to collect an account held by the latter against defendant Harrington. The account was reduced, through the efforts of counsel, to the form of a note and mortgage; the mortgage covering certain stock and fixtures belonging to Harrington.

ton. Subsequently Daw gave an order on his attorneys to appellants Gottstein and Gottstein for the delivery of the note and mortgage to said appellants. The attorneys refused to make such delivery, claiming an attorney's lien against the papers in their hands, but did agree with appellants that, when the note and mortgage should be satisfied, they would pay the Gottstein claim against Daw and Harrington out of the proceeds, first satisfying their own lien for attorney's fees. Later Harrington, with consent of Daw, sold the stock and fixtures covered by the mortgage to respondents Thayer & Miller, and at the time of said sale Daw satisfied the mortgage in full on the county records. Thereafter Brady & Gay and Milo A. Root assigned their lien claim to Gottstein & Gottstein, and transferred the possession of the note and mortgage in question to said appellants, who thereupon brought this action to enforce the lien so assigned, and the claim against Harrington and Daw hereinbefore mentioned. Upon hearing in the court below, the court found substantially as above stated, and, further, that the sale made to Thayer & Miller was in good faith on the part of Thayer & Miller, and that a *bona fide* consideration passed, and gave judgment for defendants.

Several exceptions were saved to the findings of fact of the court below, but we do not believe that a particular discussion of them is essential to the determination of this case; the facts above set out being conceded, and the findings appearing to be warranted by evidence. Appellants contend that a lien given by statute in this state to an attorney upon his client's papers is an enforceable lien, and is not affected by a *bona fide* purchase of property covered by the instrument on which the lien is claimed. Originally, at the common law, there was no attorney's charging lien. There was a general or retaining lien, which con-

July, 1901.]

Opinion of the Court—ANDERS, J.

sisted in a right to retain the papers of the client left in the attorney's hands until the amount due him for services was paid; and this lien has been very generally recognized in American jurisprudence. The special or charging lien, which is also recognized by the statute law of this country, and especially of this state, applies only to judgments, money in hand or in the hands of the adverse party after notice. The statute of this state (Bal. Code, § 4772) is merely declaratory of the common law on the question of the general or retaining lien, but it recognizes the right to a special or charging lien, and provides the method of establishing the latter. That part of the statute applicable to the present case is as follows:

"An attorney has a lien for his compensation . . . upon the papers of his client, which have come into his possession in the course of his professional employment."

It seems apparent that the statute did not intend to confer an enforcible lien against papers in possession, as it provides no method for the enforcement of such lien. This, indeed, is but a recognition of the general law that a retaining lien may not be enforced, but may merely be used to embarrass the client, or, as some cases express it, to "worry" him into the payment of the charges. 13 Enc. Pl. & Pr., 143 and notes; 3 Am. & Eng. Enc. (2d ed.), 464; Weeks, Attorneys, 760-75; Jones, Liens, § 132; Mecham, Agency, §§ 860, 867; *Hurlbert v. Brigham*, 56 Vt. 368; *Manning v. Leighton*, 65 Vt. 84 (26 Atl. 258, 24 L. R. A. 684); *Bozon v. Bolland*, 4 Myl. & C., 354, 358; *Heslop v. Metcalfe*, 3 Myl. & C. 183; *Colegrave v. Manley*, T. & R. 400; *In re Wilson*, 12 Fed. 235; *McDonald v. Railroad Co.*, 93 Tenn. 281 (24 S. W. 252); *Brown v. Bigley*, 3 Tenn. Ch. 621; *Tillman v. Reynolds*, 48 Ala. 365.

It is evident that, if the retaining lien is an active lien, such as can be enforced by process, the statute must fur-

nish the process; but this it does not do. The lien of an attorney upon the papers of his client is personal to the attorney, and is not subject to assignment. Possession is of the essence of this lien, and, once parted with, the right is waived and relinquished. 3 Am. & Eng. Enc. Law (2d ed.), pp. 456-463; Jones, Liens, *supra*; Weeks, Attorneys, 762, § 375; *Chappell v. Dann*, 21 Barb. 17; *Larned v. Dubuque*, 86 Iowa, 166 (53 N. W. 105); *Beech v. Canaan*, 14 Vt. 485; *Sullivan v. Mayor*, 68 Hun, 544 (22 N. Y. Supp. 1041).

It is contended by the learned counsel for appellants that, even if the attorney's lien was waived or lost by the transfer of the papers on which such lien was claimed, the delivery of the note and mortgage in pursuance of the order of the payee and mortgagee, without indorsement or written assignment, constituted an assignment in equity enforceable by appellants against the property in the possession of the respondents to the extent of their claim against Harrington and Daw. But we are unable to agree with counsel upon this proposition. After the order was given to the attorneys to turn over the note and mortgage to appellants, which they refused to do, it was then agreed, as we have seen, between appellants and said attorneys, that the latter should pay appellants' claim out of the moneys which they might collect on the note, after satisfying their charges for professional services. Possession of the note and mortgage was retained by the attorneys until after the mortgaged property had been sold to Thayer and Miller and the mortgage satisfied by the mortgagee, and nothing was ever collected by them on the note. Whether the mere delivery of a note and mortgage by the payee and mortgagee (without indorsement or written assignment) to a creditor constitutes, in this state, such an assignment that the holder may enforce the mortgage by

July, 1901.]

Opinion of the Court—ANDERS, J.

an action in his own name, is, to say the least, extremely doubtful in view of existing statutes. Bal. Code, § 4835. See, also, Bal. Code, § 4565. But, be that as it may, it seems quite clear that the appellants, under the circumstances of this case, never acquired any rights in or to the property in question as against the respondents. Before paying over the purchase price, the respondents, by their attorney, examined the county records to ascertain what mortgages or liens there were upon the property which they had agreed to purchase, and found none except the mortgage from Harrington to Daw. This examination was made in the presence of both Harrington and Daw, and the latter then satisfied the mortgage upon the records, and the respondents thereafter paid the amount stipulated for the property thus released from the mortgage lien, and at once took, and have ever since retained, possession of the same. It is provided in the act of February 25, 1897, entitled "an act relating to assignments and satisfaction of mortgages," that any person to whom any real estate or chattel mortgage is given, or any person to whom any such mortgage has been assigned in the manner provided therein, and who has recorded the assignment in the office of the auditor of the county wherein such mortgage is of record, may acknowledge satisfaction of the mortgage, and discharge the same of record. Laws 1897, p. 23; Bal. Code, § 4565. It would seem from the above provision of the statute that the respondents were not legally bound to look beyond the records in the office of the county auditor for assignments of the mortgage there of record, and that they had a perfect right to presume that no such assignment had been made. There does not appear to have been any intention on the part of the respondents in the transaction between them and defendants Harrington and Daw to prevent or delay the

collection of appellants' claim against these defendants, or either of them. In fact, the testimony on the part of the respondents is to the effect that they had, at the time they purchased the property in dispute, no knowledge that either Daw's attorneys or the appellants claimed a lien upon the mortgage to Daw, or upon the property described therein. They were, as the court below found, *bona fide* purchasers for a valuable consideration, and obtained a clear title to the property.

We are clearly of the opinion that the judgment of the court below was right, and it is, therefore, affirmed.

REAVIS, C. J., and DUNBAR, J., concur.

FULLERTON, J., concurs in the result.

[No. 3895. Decided July 13, 1901.]

JOHN RIDDELL *et al.*, Appellants, v. ARTHUR H. BROWN,
Respondent.

APPEAL — SUFFICIENCY OF EVIDENCE.

The findings of the trial court will not be disturbed, where the evidence is conflicting, unless clearly contrary to the weight of the evidence.

TIDE LANDS — OYSTER BEDS — IMPLIED LICENSE TO CULTIVATE —
ABANDONMENT.

The fact that plaintiffs had planted and cultivated oysters upon public lands for a number of years under an implied license, would give them no right to restrain defendant from going into possession of such oyster bed under deed from the state, when plaintiffs' possession and occupation had been abandoned at the time of the sale by the state to defendant.

Appeal from Superior Court, Pacific County.—Hon. HENRY S. ELLIOTT, Judge. Affirmed.

Fred L. Rice, for appellants.

Welsh & Thorp, for respondent.

July, 1901.] Opinion of the Court—MOUNT, J.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by appellants against respondent for the purpose of restraining respondent from entering upon and interfering with the appellants' use of an oyster bed situated in "Willapa or Shoalwater Bay" in Pacific county, Washington. The complaint alleges substantially that plaintiffs and their predecessors have been in possession of said oyster bed by implied license from the state for a period of thirty years continuously, occupying it, planting and cultivating oysters thereon, and that they now have large amounts of oysters thereon; that on or about the 11th day of May, 1899, defendant, without right, and unlawfully, entered upon said bed, and began destroying plaintiffs' oysters, and threatens to again enter thereon unlawfully, and destroy plaintiffs' oysters, and exclude plaintiffs therefrom; that defendant is insolvent, etc.; and prays for a restraining order. Respondent, after denying all the above named allegations except that he admitted he entered upon the said lands, and intended to exclude plaintiffs therefrom, alleged affirmatively that the said lands, comprising about thirty acres, prior to January, 1899, were unoccupied oyster lands belonging to the state of Washington, and on said last named date the defendant, being qualified therefor under the law, purchased the same from said state for the purpose of cultivating oysters, and received a deed therefor; that he immediately took possession thereof. Other defenses, which are not necessary to be mentioned here, were also pleaded. A trial was had on the issues joined, and findings and a decree were rendered by the court in favor of defendant. Plaintiffs appeal.

Several interesting questions are argued in the briefs, which are not necessary to be noticed here. Plaintiffs do not claim to own the said lands, and there seems to be no

dispute of the fact that the state, prior to January 11, 1899, was the owner in fee thereof, and on that date made a deed thereof to defendant. Plaintiffs contend, however, that, having been permitted by the state to plant and cultivate oysters thereon for a long period of time, defendant, even though the owner, could not take possession from plaintiffs until their growing oysters had been removed, and that no opportunity had been given therefor. It was alleged in the complaint that plaintiffs had been for a long period of time in possession of said land, cultivating oysters thereon, and that there were at said time large quantities of oysters thereon belonging to plaintiffs. These allegations were denied. They were material allegations on the part of the plaintiffs, and necessary to be proved. To prove them, plaintiffs called a number of witnesses, who testified substantially to those facts. On the other hand, defendant called a number of witnesses, who testified, in substance, that the lands in question had no oysters of any consequence thereon; that the lines were unmarked, and had been so for some time previous, and that the said lands were in an abandoned condition. Upon this evidence the court found as follows:

“That at the time defendant Brown made said application to purchase said tide or oyster land and at the time he purchased the same from the state of Washington and received his deed therefor, there were no oysters whatever on said land or any part thereof excepting a few scattering oysters which could not well be gathered and in such insufficient quantities as would not pay to gather, as all of the oysters which had been planted prior to the said time it was sold to the defendant Brown by the state of Washington, had been gathered and taken therefrom, and said oyster land was, at the time that the defendant purchased and received his deed therefor, in an abandoned condition, and was an abandoned oyster bed, and all of the oysters which could well be gathered therefrom had

July, 1901.] Opinion of the Court—MOUNT, J.

been taken away. That plaintiffs were not in possession of said oyster land or any part thereof, and did not have title to the same or any part thereof, at the time that the state of Washington sold the same to said defendant, and plaintiffs were not at said time entitled to the possession of the same or of any part thereof. And that at the time that the said state of Washington executed and delivered to the defendant said deed to said oyster land, the plaintiffs did not own or have any oysters thereon, and there were no oysters whatever on said land, and that there were no oysters on said land which had been planted thereon prior to March 26, 1890."

Where the evidence is conflicting,—as it is in this case,—it has been the rule of this court not to disturb the findings of the lower court, unless the weight of the evidence is clearly against such findings. The weight of the evidence here is certainly not against the findings. *Washington Dredging & Imp. Co. v. Partridge*, 19 Wash. 62 (52 Pac. 523); *Ford v. Jones*, 22 Wash. 111 (60 Pac. 48).

Where a plaintiff relies upon an implied license to plant and cultivate oyster lands to the exclusion of the owner, he must show his continued occupation of such lands. He cannot be permitted to abandon the premises, and afterwards exclude the owner, simply because at one time he may have had a right thereto. If plaintiffs ever had any right to these lands, their failure to establish possession and occupation at the time defendant took possession defeated their right to restrain defendant's possession. Where their abandonment is shown, certainly they could not prevail. For this reason the judgment must be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON, ANDERS, HADLEY and WHITE, JJ., concur.

[No. 3936. Decided July 13, 1901.]

CHARLES P. COEY, *Appellant*, v. WILLIAM H. DARKNELL,
Respondent.

WITNESSES — SCOPE OF CROSS-EXAMINATION.

In an action upon a promissory note, where there was a distinct issue raised by the pleadings as to whether it had been partially paid by defendant's delivery to plaintiff of a crop of wheat, and where defendant's witness had testified to that effect, cross-examination of the witness directed to the condition of the crop, for the purpose of showing that the quality of the wheat would make such a contract improbable, was proper, although the witness had not testified in chief as to the condition or value of the crop.

SAME—QUESTION FOR JURY.

In such a case, it is not only competent for plaintiff to show the improbability of the alleged contract owing to the poor condition of the wheat, by cross-examination of defendant's witnesses, but he would be entitled to have the question of such improbability submitted to the jury upon the cross-examination alone, without the introduction of rebuttal evidence.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Crow & Williams, for appellant.

A. J. Laughon, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought to recover the amount of a promissory note made by William H. Darknell to Charles P. Coey. The note was dated April 13, 1899, matured October 1, 1899, and is for the principal sum of \$237.85, with interest at one per cent. per month after maturity, and \$50 attorney's fees should suit or action be instituted to collect it. The complaint alleges that no payments have been made upon the note, and that the whole amount of principal and interest thereon is due and

July, 1901.] Opinion of the Court—HADLEY, J.

unpaid. The answer admits the execution of the note, but denies the remaining allegations of the complaint. It is also alleged affirmatively in the answer that the defendant sold his interest in a crop of grain which grew upon a farm owned by plaintiff to one Collins, the agent of plaintiff, and as a consideration for such sale Collins, as agent of plaintiff, promised and agreed to credit defendant with the sum of \$212 on the aforesaid note, and that thereafter said agreement made by said Collins with defendant was ratified by plaintiff. It is further alleged affirmatively that, at the special instance and request of plaintiff, defendant purchased for plaintiff's use and benefit a quantity of grain sacks, for which he paid the sum of \$43, and that plaintiff thereafter used said sacks, and promised and agreed to pay defendant the sum of \$43 therefor. The answer seeks to have the \$212 item above mentioned credited upon the amount of said note, and also as much of the \$43 item as is required to pay the balance of the note, and prays for judgment over against plaintiff in the sum of \$17.25. The reply denies all the affirmative allegations of the answer. A trial was held before a jury, and a verdict returned in favor of defendant and against the plaintiff for the sum of \$18.35. A motion for a new trial interposed by plaintiff was by the court denied, and judgment was thereafter entered in favor of defendant and against the plaintiff for the sum of \$18.35 and costs. From said judgment the plaintiff has appealed.

At the trial respondent introduced evidence in support of the affirmative allegations of his answer. Both respondent and a witness in his behalf by the name of Dimmick testified as to the fact of the sale of the crop and the terms thereof as set up in the answer. Upon cross-examination of the said witnesses concerning the said contract of sale, appellant's counsel sought to show by them that the crop

which they had testified was sold was in poor condition and of little value. General objections to questions intended to elicit such testimony were by the court sustained; whereupon counsel for appellant made the following offer:

“For the purpose of making the record I now make an offer of what we wish to ask this witness. We offer to prove by this witness on cross-examination on the question as to whether or not a contract was ever made that the crop was in a very bad condition; that it was very questionable whether there would be sufficient realized from it to pay the actual harvesting expenses, including heading and threshing, and that all of the parties were familiar with the condition of the crop.”

To this offer a general objection was made that the testimony was immaterial, incompetent, and irrelevant, which objection was also sustained. These rulings of the court are assigned as error, and it is urged by appellant that the error so assigned falls within the rule recently announced by this court in the cases of *Wheeler v. F. A. Buck & Co.*, 23 Wash. 679 (63 Pac. 566), and *Dimmick v. Collins*, 24 Wash. 78 (63 Pac. 1101). It is conceded by counsel for respondent that unless this case can be distinguished from that of *Dimmick v. Collins*, *supra*, it will have to be reversed, and a new trial must necessarily be ordered. The last named case involved the identical contract which is under consideration in this case. The appellant in that case, both by cross-examination of his adversary's witnesses and by his own evidence, offered to prove the character, condition, and value of the crop at the time the contract was alleged to have been made. Objections to questions having this object in view were sustained by the court. While the appellant in that case was upon the stand as a witness in his own behalf, and after he had denied the making of the alleged contract, and after he had

July, 1901.] Opinion of the Court—HADLEY, J.

also denied that he was to pay any sum except from the proceeds of the crop, his counsel asked him the following question: "State what the condition of the crop was." The court sustained an objection to said question. Thereupon counsel made an offer to prove certain facts concerning the crop, which was almost identical with the offer made in the case at bar. An objection to the proposed testimony was sustained. This court held that the evidence was relevant, and should have been admitted. It is said in the opinion in that case:

"Where there is a dispute between the parties whether or not such a contract has been made, the circumstances surrounding the transaction are permissible to show whether the contract was probable. The law assumes that men make fair bargains; that is, that when they contract they make their agreements equal."

The case of *Wheeler v. F. A. Buck & Co., supra*, is cited in the opinion as decisive of the case. The opinion in the last named case extensively discussed the principle invoked here, and many authorities bearing upon the point are cited therein. It is therefore unnecessary to review them here. In the case at bar the alleged contract for sale of the crop was set up in respondent's answer and denied by the reply. Its existence was therefore squarely in issue under the pleadings. After respondent and his witness had testified that such a contract was made, appellant sought by cross-examination to show that the crop had little value as bearing upon the improbability that such a contract was made. Respondent's counsel concedes the correctness of the rule of law announced in the cases above mentioned, but undertakes to distinguish this case from those on the ground that the controversy over the proposed testimony in this case arose during cross-examination of respondent's witnesses. It is urged that the proposed cross-examination was not proper cross-examination, for

the reason that the witnesses had not been asked in chief anything about the condition or value of the crop, and several decisions of this court are cited in support of the well known rule that the scope of cross-examination is confined to the same matters to which the examination in chief is directed. The objection was, however, not based upon the ground that it was not proper cross-examination, but was a general objection on the ground of immateriality and incompetency. But, in any event, even if the objection had been urged upon that specific ground, we think it would not have been well taken. The scope of cross-examination is not confined to merely asking a witness if certain facts about which he has testified in chief are or are not true. It would be of little use if it were so restricted. Its office is rather to test the accuracy of the witness's statements in chief by a searching inquiry as to all matters directly stated or suggested by his testimony the analysis of which may tend to discredit the truthfulness of his statements.

Greenleaf, in his work on Evidence (vol. 1 [15th ed.], § 446), says:

“The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests, which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified; and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to im-

July, 1901.]

Opinion of the Court—HADLEY, J.

pose on a court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended.”

These witnesses had testified that a certain contract had been made for the sale of a certain crop, the terms of which, as stated by them, necessarily included a consideration of some value for the crop. It is true they were not asked in chief about its value or condition, but it was certainly a matter for legitimate inquiry upon cross-examination to ask about the value and condition of the very thing which was the subject matter of the alleged and disputed sale. If it had developed upon cross-examination that the crop was of little value, or, as suggested in the proposed offer, was not worth more than the cost of harvesting and threshing, such fact so elicited from the witnesses who had testified as to a positive contract, would have had a tendency, at least, to discredit their testimony because of the improbability that such a contract would have been made concerning a practically valueless crop. We, therefore, think the testimony sought was proper on cross-examination. It does not meet the difficulty here to say that appellant could have introduced this evidence in chief under his reply. The right of proper cross-examination is as fully secured to a litigant as is the right to introduce evidence in chief. The existence of the contract having been denied in the pleadings, the burden of proof was upon the respondent to establish it, and appellant had the right, if he so chose, to submit to the jury the fact as to the alleged contract, upon the testimony adduced by respondent's own witnesses as developed by cross-examination.

In *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549, 553, 554 (6 Am. Rep. 140), it is said:

“It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a

fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. . . . But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached."

It is contended by appellant that both respondent and the witness Dimmick are shown by the evidence to have been interested in sustaining the alleged contract of sale, and that, if appellant had been permitted on cross-examination to show the improbability of their statements, the jury might have found on their testimony alone that no such contract was ever made. The case of *Kavanagh v. Wilson*, 70 N. Y. 177, was an action by a real estate broker against the personal representatives of a deceased customer to recover an alleged agreed compensation for effecting a sale. The only witness as to the contract was the son of the plaintiff, whose own compensation depended upon plaintiff's success. The compensation alleged to have been agreed upon was more than double the usual compensation, and other circumstances rendered the statement of the witness not entirely free from improbability. It was held that the case was a proper one for the jury and

July, 1901.] Opinion of the Court—HADLEY, J.

that a refusal to submit the question to the jury, and the direction of a verdict for the amount claimed was error. In the case of *Tracey v. Town of Phelps*, 22 Fed. 634, 635, it is said:

“Upon this case the court refused to rule, as matter of law, that Post was a *bona fide* purchaser of the bonds, and left the question as one of fact to the jury. This was not error, because the jury were at liberty utterly to reject his testimony as incredible, although he was not impeached or contradicted by direct evidence. It was enough to authorize the jury to do this, that there was some intrinsic improbability in Post’s narrative, and he had shown himself unworthy of credit by his attempt to falsify the transaction respecting the sale of the bonds made by him to the plaintiff.”

In *Quock Ting v. United States*, 140 U. S. 417, 420, 421 (11 Sup. Ct. 733), it is said:

“Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.”

The subject matter of the testimony proposed in this case comes clearly within the rule announced in *Wheeler v. F. A. Buck & Co.* and *Dimmick v. Collins*, *supra*, and for reasons herein assigned, we think appellant’s right to

pursue a cross-examination of respondent and his witnesses upon that subject is such as cannot be denied. Whether the permission of such cross-examination would have led to a different result of course we cannot know. It is sufficient to say it might have done so, since the jury would then have had the benefit of the witnesses' statements and manner of testifying upon that line of examination. A principle is involved here which is invoked directly under former decisions of this court, and, since we believe those decisions are founded upon correct principles, we must follow them. It is proper to say that the decisions referred to had not been rendered at the time this case was tried below. Since the case must be reversed upon the ground herein discussed, it is not necessary to discuss other assignments of error.

The judgment is reversed and the cause remanded, with instructions to the court below to grant the motion for a new trial.

REAVIS, C. J., and ANDERS, DUNBAR, FULLERTON, MOUNT and WHITE, JJ., concur.

[No. 3972. Decided July 13, 1901.]

*In the Matter of the Application of CHARLES COULTER
for a Writ of Habeas Corpus.*

CONTEMPT — LEGALITY OF COMMITMENT.

Under Bal. Code, §5798, subd. 5, which provides that disobedience of any lawful judgment, decree, order or process of the court shall be deemed a contempt of court, and Id., § 5801, which provides that, where a contempt is not committed in the immediate presence and view of the court, "before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court," the court has no authority to punish defendant for contempt in refusing to apply money in his possession towards the satisfaction of a judgment,

25	526
27	690

25	526
29	580

25	526
39	136

25	526
40	526

July, 1901.]

Opinion Per Curiam.

as ordered by the court in supplemental proceedings, where the fact of such refusal is brought to the attention of the court by the return of the sheriff and not by way of an affidavit.

SAME—REVIEW IN HABEAS CORPUS PROCEEDINGS.

Although the court in proceeding in a contempt matter without having the facts constituting it shown by affidavit may be merely erroneously exercising jurisdiction, rather than acting without jurisdiction, yet the legality of the order of commitment may be inquired into by writ of habeas corpus, under Bal. Code, § 5826, which restricts courts or judges from inquiring into the legality of any judgment or process whereby the party is in custody for any contempt of court; but provides that an order of commitment as for a contempt upon proceedings to enforce the remedy of a party, shall not be included in the restrictions upon such inquiry.

Ballinger, Ronald & Battle, and Humes, Miller & Lyons, for petitioner.

Preston, Carr & Gilman, for respondent.

PER CURIAM.—This is an original application for a writ of habeas corpus. Briefly, the facts are these: On the 9th day of March, 1901, one J. Eugene Jordan, as plaintiff, began an action against the petitioner and another, as defendants, to recover the value of a certain quantity of gold dust which he alleged the defendants had received for and upon his account, and had wrongfully converted to their own use. After issue joined, a trial was had, which resulted in a money judgment in favor of the plaintiff. Execution was issued thereon, and returned unsatisfied. Thereupon the plaintiff instituted proceedings under the statute relating to proceedings supplemental to execution, averring in his affidavit therefor that the defendants had property, consisting of a certain quantity of gold dust, in their possession, and under their control, which they unjustly refused to apply towards the satisfaction of his judgment. On the hearing the court found that one of the defendants (the petitioner herein) had in

his possession and under his control the sum of \$500 in money belonging to himself, which he unjustly refused to apply towards the satisfaction of the judgment, and entered an order directing that the petitioner pay the money forthwith to the sheriff, to be applied thereon. The sheriff immediately served the order upon the petitioner, and demanded of him payment of the money. Payment was refused, and the sheriff made return accordingly. On the return of the sheriff being filed, the court, of its own motion, and without any further showing, entered an order directing that the petitioner appear before the court at a time and place fixed therein, and show cause, if any he had, why he should not be punished as for contempt for the disobedience of the order. The petitioner appeared at the time and place named, and objected to any proceedings being had touching the order to show cause, for the reason that the court was without power to make the same, which objection being overruled, he answered to the merits, setting up substantially the matters alleged and shown at the original hearing. The answer was stricken out as sham, frivolous, and constituting no defense, after which, without further hearing, the court adjudged the petitioner guilty of contempt, and sentenced him to imprisonment in the county jail for a period of ninety days.

The statute (§ 5798, subd. 5, Bal. Code) provides that disobedience of any lawful judgment, decree, order, or process of the court shall be deemed a contempt of court. Section 5800 provides that, when a contempt is committed in the immediate view and presence of the court, it may be punished summarily; and § 5801 that in cases other than those mentioned in the preceding section (§ 5800), "before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court" While the power to

July 1901.]

Opinion Per Curiam.

punish for contempt is inherent in all courts, as such power is essential to the preservation of order, the due enforcement of the judgments, orders, and processes of the court, and, consequently, to the due administration of justice, it is, nevertheless, in its nature, arbitrary, capable of abuse, and, when exercised, affects either the property or the personal liberty of the individual against whom it is directed. And while the legislature may not lawfully take away this power altogether, it can, undoubtedly, to prevent its abuse, and to preserve the just rights of the individual, reasonably limit its exercise; that is to say, it can declare what acts or omissions shall constitute contempt, define the character, and limit the amount of punishment that may be inflicted for their breach, and prescribe the method of procedure by which the recusant party shall be brought before the court, and the procedure to be followed upon his trial. It is clear that the contempt charged against the petitioner is not one committed in the immediate view and presence of the court, which can be punished summarily. It is equally clear that it is one which, by the terms of the statute, must be brought to the attention of the court by an affidavit stating the facts constituting the contempt before any proceedings can be taken therein. When, therefore, the lower court proceeded to punish the petitioner without following the prescribed procedure, it proceeded illegally, and without authority of law. It is no answer to say that the facts were brought before the court by the return of the officer. If the court may derive knowledge of the violation of its order from this source, it may, from any other source, even the oral statement of a stranger to the proceedings. More than this, the statute is imperative. It has made an affidavit essential to set the powers of the court in motion, and, although the rights of the parties may be as well pro-

tected in a procedure had upon the return of the officer as in a procedure had upon an affidavit, yet the courts may not alter the statute.

It is said that the lower court, in proceeding in the matter without having before it an affidavit showing the facts constituting the contempt, was but erroneously exercising jurisdiction, not acting without jurisdiction, and that the legality of its order cannot be inquired into in habeas corpus proceedings. Conceding the construction put upon the action of the court to be correct, and the general rule of law to be as stated, it does not aid in the present case. The legality of an order of commitment as for contempt had upon proceedings to enforce the remedy of a party may be inquired into by this writ. Bal. Code, § 5826. *In re Van Alstine*, 21 Wash. 194 (57 Pac. 348).

The petitioner is entitled to his discharge, and it is so ordered.

[No. 3872. Decided July 15, 1901.]

S. T. PACKWOOD, *Respondent*, v. B. F. BRIGGS, *Appellant*.

TAXATION — PAYMENT BY JUDGMENT LIENOR — TAX LIENS.

Laws 1897, p. 175, § 82, which provides that "any person who has a lien, by mortgage or otherwise, upon any real property upon which the taxes have not been paid, may pay such taxes and the interest, penalty and costs thereon," for which he shall have a lien collectible "as a part of and in the same manner as the amount secured by the original lien," is applicable to holders of general judgment liens as well as to holders of specific liens.

SAME — WHEN EQUITABLE LIEN ARISES THROUGH PAYMENT OF TAXES.

Where a judgment creditor in good faith pays the delinquent taxes against his debtor's land, in the belief that he has a lien against the premises, and is protecting himself against a paramount claim, he is entitled to an equitable lien as against a mortgagee for the sums expended for taxes, with interest thereon.

25	530
29	184
129	255
129	665
25	530
30	593
31	65
31	316
25	530
32	87
132	314
25	530
33	289
25	530
134	314
25	530
37	270
25	530
40	192

July, 1901.] Opinion of the Court—HADLEY, J.

JUDGMENTS—LIEN—REVIVAL.

Under Code Proc., §§ 462, 463, which provide that the lien of a judgment continues for five years from the date of its rendition, and that proceedings to revive the lien may be instituted within six years from the date of judgment, the judgment lien terminates at the expiration of five years from its date of rendition, and becomes inoperative for any purpose unless revived within the succeeding year, when the lien again begins to operate from the date of revivor.

SAME—EXPIRATION OF LIEN PENDING EXECUTION SALE—EFFECT.

An execution sale upon a judgment whose lien has expired is void, even if the execution had been issued prior to the expiration of the lien.

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Modified.

E. F. Blaine and Wilmon Tucker, for appellant.

Graves & Englehart, for respondent.

The opinion of the court was delivered by

HADLEY, J.—S. T. Packwood, respondent here, brought this action below to foreclose a mortgage upon certain real estate situated in Kittitas county. The mortgage was executed by John A. Shoudy and wife on the 28th day of March, 1894, to secure a note of said John A. Shoudy, payable to said Packwood for the sum of \$4,000. Said note was of even date with the mortgage and payable one year after date. Before the commencement of this action, \$3,000 had been paid upon the note, and the balance of the principal and interest was unpaid. On the same day the mortgage was executed it was filed for record in the auditor's office of Kittitas county. At the time of the execution of the mortgage the said Shoudy was indebted to various persons, and, among others, he was indebted to Dexter Horton and A. A. Denny. Being desirous of securing said Horton and Denny, it was agreed that Shoudy should confess judgment in their favor for the amounts

he was owing them respectively. In pursuance of such understanding, the indebtedness against Shoudy held by Horton and Denny, respectively, was by each of them transferred to B. F. Briggs, who is appellant here, as trustee for both Horton and Denny. Action was instituted by said Briggs against Shoudy upon such indebtedness in the superior court of King county, and such proceedings were had that on the 27th day of March, 1894, judgment was entered against Shoudy for the sum of \$26,752.70 and costs. On the 28th day of March, 1894, a transcript of said judgment was duly filed in the office of the clerk of the superior court of Kittitas county. On the 25th day of March, 1899, an execution under said judgment was issued by the clerk of the superior court of Kittitas county, directed to the sheriff of said county, which purported to authorize said sheriff to sell the real estate of Shoudy, the judgment debtor, to satisfy said judgment. Thereafter, on the 6th day of May, 1899, the sheriff made such sale of Shoudy's real estate, including in such sale the lands covered by respondent's mortgage; and said Briggs, the judgment creditor, became the purchaser at said sale. Afterwards, on the 26th day of June, 1899, said Briggs paid taxes upon the property included in the mortgage, and which had been sold to him as aforesaid, and also redeemed said property from a tax sale; the amount paid by him on account of such taxes being \$460. It will be observed that the mortgage and transcript of judgment were filed in the proper office of Kittitas county on the same day. It appears that a short time prior to the entry of the judgment and the execution of the mortgage, some conferences were had between Horton, Denny, Packwood, and Shoudy and their representatives, at which the plan of procuring the judgment and mortgage as security for the respective parties was discussed. It is contended by

July, 1901.]

Opinion of the Court—HADLEY, J.

respondent, Packwood, here that it was then expressly agreed that the mortgage lien should be superior to the lien of the judgment upon the real estate included in the mortgage. This is denied by appellant, Briggs; he contending that it was understood that the judgment lien should be prior. Since the liens were created the same day, it became necessary in the court below, in view of the dispute as to priority, to determine which was the prior lien. The evidence conflicts upon this point, but the court found that it was agreed that the mortgage should be the prior lien. An exception was taken by appellant to this finding, but it is not assigned as error. But if we should assume that the question, upon the finding, is properly before us, we think it was justified by the evidence, and we should not be disposed to disturb it. It must, therefore, be deemed settled that the mortgage lien of respondent is superior to any lien that may exist under the judgment, and the finding and decree of the lower court in that particular are sustained.

The appellant, Briggs, after setting up in his answer the facts concerning payment of taxes as heretofore stated, prays judgment that a lien against the property upon which taxes were paid be decreed in his favor for the amount paid, together with interest thereon from the date of payment. Appellant bases his right to have the taxes so paid by him declared a lien upon the legislative provision found in chapter 71, § 82, p. 175, Session Laws of 1897:

“Any person who has a lien, by mortgage or otherwise, upon any real property upon which the taxes have not been paid, may pay such taxes and the interest, penalty and costs thereon; and the receipt of the county treasurer shall constitute an additional lien on such land, to the amount therein stated; and the amount so paid and the interest thereon, at the rate specified in the mortgage or other in-

strument, shall be collectible with, or as a part of, and in the same manner as the amount secured by, the original lien.”

It is contended by respondent that the above provision is intended to apply only to the holder of a lien upon specified real estate, such as a mortgage lien, and that it does not apply to the holder of a general lien such as a judgment lien. We believe, however, that the language of the statute is broad enough to include the holder of any lien. The words are, “Any person who has a lien by mortgage or otherwise upon any real property” A judgment of the superior court is a lien upon the real estate of the judgment debtor in the county where the judgment is entered, or in which a properly certified transcript of a judgment rendered in another county has been filed. The statute plainly says that a lien created by mortgage “or otherwise” entitles its holder to pay the unpaid taxes and the interest, penalty, and costs, and that the receipt of the county treasurer shall constitute an additional lien for the amount. If, therefore, appellant was the holder of a valid judgment lien against the mortgaged property at the time he paid the delinquent taxes and redeemed from the tax sale, he is entitled, by virtue of the statute, to have the amount paid declared a lien upon the land prior to respondent’s mortgage lien. Did appellant hold a valid judgment lien at the time? The judgment was entered on the 27th day of March, 1894, and the taxes were paid on the 26th day of June, 1899. Sections 462 and 463, 2 Hill’s Code, provide that the lien of a judgment continues for five years from the date of its rendition, and that proceedings to revive the lien may be instituted within six years from the date of judgment. Appellant’s counsel contends that these two sections must be construed to mean that the lien of the judgment continues

July, 1901.] Opinion of the Court—HADLEY, J.

for six years from date of judgment, and he therefore concludes that the lien of appellant's judgment continued until the 27th day of March, 1900. This court recently decided against appellant's contention in *Brier v. Traders' National Bank of Spokane*, 24 Wash. 695 (64 Pac. 831). This subject is exhaustively discussed in the opinion in that case, and it is there held that the lien of the judgment expires at the expiration of five years from the date of the judgment, and, while it may be revived at any time within the sixth year, yet after the expiration of the five years the lien is entirely dead until the judgment of revival has been entered. In other words, the revival proceedings have the effect to vivify that which was dead, but pending the time between the expiration of the five years and the judgment of revival there is no lien, and its revival does not relate back to the end of the five year period. It must, therefore, be held in this case that after the 27th day of March, 1899, appellant had no judgment lien.

It is urged by respondent that the attempted execution sale was void for several reasons, but a discussion of them all is not necessary for the decision of this case. The execution was void at the time of the attempted sale, for reasons heretofore stated. There being no lien in existence, there could have been no authority for the sale in any execution that might have been issued. It is true, this execution was issued a few days before the expiration of the five year period; but the lien itself, the authority for any execution and sale, was dead long before the attempted sale. It follows that, if appellant is entitled to relief on account of the taxes paid, it must be based upon equitable grounds, considered with reference to the relations of the parties to the subject matter. It must be conceded that appellant paid the taxes in good faith, relying upon what he believed to be his lien as authority for it. It cannot be assumed that

the payment was made as that of a mere volunteer, or as that of one meddling with something in which he knew he had no interest. The evidence shows that the payment was made in the honest belief that appellant held a valid lien upon the land, and he was only seeking to prevent the paramount lien of the taxes from destroying the value of what he believed to be his own lien against the lands. The decision in *Brier v. Traders' National Bank*, *supra*, had not been rendered at that time; and as far as any judicial interpretation of the statute relating to the continuation of judgment liens pending the year in which a revival must be had was concerned, it may be said to have been an open question at that time.

In *Fiacre v. Chapman*, 32 N. J. Eq. 463, a second mortgagee redeemed from certain tax sales which the complaint alleged were invalid, and this was not denied; but in an action to foreclose the first mortgage, to which the second mortgagee was a party, he sought to recover what he had paid. The court, at pages 464 and 465 of the opinion, says:

“But while the defendant has not established a paramount title under the sales (indeed, he claims none, but only a lien), he has shown that he has paid, by way of redemption, taxes assessed upon the property, and which, under the charter, were a prior lien to the complainant's mortgage, and for non-payment whereof the property might have been sold, and under the sale a title superior to the complainant's mortgage given. . . . But it is urged, on behalf of the complainant, that though the taxes were a lien on the land paramount to the first mortgage, yet the lien is discharged by the payment. If it be conceded that the lien was discharged by the payments, that will not deprive Mr. Mitchell of his right of reimbursement for the payments out of the property in advance of the lien of the complainant's mortgage. They were in no sense voluntary. It is proved that he made them, relying on the lien for his indemnity. He, indeed, was not compelled to make

July, 1901.]

Opinion of the Court—HADLEY, J.

them by any duty he owed the complainant, but, in order to relieve the property from the paramount lien of the taxes and protect it for himself against the consequences thereof, he was constrained to make them. Having thus preserved the property to the complainant as well as himself, he is entitled to equitable subrogation,”

In *Merrill v. Tobin*, 82 Iowa, 529 (48 N. W. 1044), the plaintiff entered certain lands, through an agent, upon county land warrants, and received from the United States a patent therefor. The land was not fenced, and was wild, unbroken, and uncultivated prairie. The plaintiff's title was defeated in the action by the defendants' showing possession in themselves; the acts of possession being such as the cutting of hay and stacking it upon the land, and such other acts of dominion over it as it was susceptible of in its wild state. For eighteen years the plaintiff paid the taxes upon the land and during all that time was a non-resident of the state, and did not visit the land and had no knowledge of any adverse claim thereto or of any one being in possession thereof until at the end of that time, when he immediately commenced an action to quiet his title thereto. It was held that the plaintiff was justified in the payment of the taxes on the land, since the evidence showed that such payment was made in good faith. It was also held that, since the present owners of the land acquired title thereto with full knowledge of the facts relating to the payment of the taxes thereon by the plaintiff, the plaintiff was entitled to have the taxes so paid established as a lien upon the land. To the same effect are the following Iowa cases: *Goodnow v. Moulton*, 51 Iowa, 555 (2 N. W. 395); *Goodnow v. Litchfield*, 63 Iowa, 275 (19 N. W. 226); *Thompson v. Savage*, 47 Iowa, 522. See, also, *Schaefer v. Causey*, 8 Mo. App. 142.

In *Parks v. Watson*, 20 Fed. 764, it is held that the state has a lien upon all lands until all taxes are paid, and that,

when taxes are paid by others than the owner of the land, the state must be considered as transferring its lien to such party, and the only way that equity should relieve the owner from the burden of such lien is by payment. Thus, it is the tendency of the courts to see that those who have in good faith advanced the money to pay public taxes are protected. This is equitable and just. No one is injured thereby. The tax lien is paramount, and payment of the taxes inures to the benefit of both the owner and lien holder. So in this case, the taxes paid by appellant inured to the benefit of respondent as mortgagee. It would be unconscionable that respondent should reap the benefit of such payment without making any compensation therefor. It must therefore be held that appellant is entitled to have the amount of taxes he paid, with interest thereon from date of payment, decreed to be a lien upon the lands for which payment was made, and such lien shall be superior to the mortgage lien of respondent. In all other particulars the judgment of the lower court is affirmed, and the cause is remanded, with instructions to the lower court to modify the decree as herein indicated, and provide that the proceeds of sale under the decree shall be applied—First, to the payment of appellant's lien for taxes; and, second, to the payment of respondent's mortgage lien.

REAVIS, C. J., and FULLERTON, ANDERS, DUNBAR, MOUNT and WHITE, JJ., concur.

July, 1901.] Opinion of the Court—MOUNT, J.

[No. 3851. Decided July 16, 1901.]

In the Matter of the Estate of C. S. SMITH, Deceased;
J. P. HAMILTON, Appellant, v. E. M. TURPIN et al.,
Respondents.

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DESCENT AND DISTRIBUTION—FUNERAL EXPENSES—WHEN CHARGED
UPON DECEDENT'S ESTATE.

Funeral expenses constitute a debt against a decedent, within the contemplation of Laws 1895, p. 197, which provides that "no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent."

SAME—STATUTE OF LIMITATIONS.

Under Laws 1895, p. 197, § 1, which provides that when a person dies seized of lands, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration, etc., and under § 3 of the act, which provides that such real estate shall not be liable for the decedent's debts, unless letters testamentary or of administration be granted within six years after his death, the real estate of a decedent is charged with such debts only in case letters were issued within the period of limitation, and where more than six years have elapsed before the issuance of letters the real estate cannot be charged with said debts.

Appeal from Superior Court, Thurston County.—Hon.
OLIVER V. LINN, Judge. Reversed.

Troy & Falknor, for appellant.

D. E. Baily and *J. W. Robinson*, for respondents.

The opinion of the court was delivered by

MOUNT, J.—On or about November 10, 1891, one C. S. Smith died in Thurston county, Washington, leaving a will, by which he bequeathed all his real and personal property to certain persons. In said will he nominated F. E. Thompson, E. K. Pitman, and T. W. Silvers, all non-residents of the state of Washington, as executors to

serve without bonds. Said will was thereafter, on November 30, 1891, upon application of said Thompson, admitted to probate in Thurston county, and said Thompson and Silvers were appointed executors thereof. Said executors never took the oath of office, and were not qualified to act as executors by reason of non-residence. The property of deceased was, however, appraised, and the appraisement filed. This appraisement showed real estate of the value of \$3,300, personal property of the value of \$36, and cash on hand \$76.80. On November 14, 1892, Harned & Bates Bros. filed with the clerk of the court a claim against the estate for funeral expenses amounting to \$112.50. On November 29, 1892, R. H. Jones filed with said clerk a claim against the estate for funeral expenses amounting to \$15. Nothing more was done in said estate until June 7, 1900, when Eunice M. Turpin and R. H. Jones, claiming to be creditors of said estate, filed a petition, praying that the order appointing said executors, and all orders made in said estate, except the order admitting said will to probate, be set aside, and held for naught, and for a special administrator thereof. The court thereupon made an order appointing F. G. Blake special administrator. Subsequently, and on June 21, 1900, upon the same petition, the court made an order finding that the appointment of said executors was void and of no effect, and setting aside all orders made in said estate except the order admitting said will to probate, because all were null and void, and appointed said Blake administrator with the will annexed. Said Blake thereafter qualified, and filed his bond as such administrator, appraisers were appointed, the real estate left by said Smith was appraised in the sum of \$880, as belonging to said estate, and no personal estate was found. On August 15, 1900, the said claims above mentioned were approved by said administrator and the court. On August

July, 1901.] Opinion of the Court—MOUNT, J.

16, 1900, a petition was filed by said administrator for the sale of the real estate for the payment of expenses of administration and the said debts. When this petition came on for hearing, appellant, claiming to have purchased a part of said real estate after the death of deceased, upon foreclosure of a mortgage executed by deceased prior to his death and the balance thereof from the heirs of deceased after his death, appeared, and objected to the court granting said petition, and ordering sale thereof, for the reason (1) that the said claims, and each thereof, had been long since barred by the statute of limitations; (2) that no letters having been issued for a period of six years after the death of decedent, said real estate could not, under the law, be sold for the payment of said debts, or any debts of the estate; (3) that appellant having purchased said property from the heirs, and having been in possession for a long period of time, paying taxes thereon, the petitioner is now estopped by reason of laches to enforce such claim against said real estate. These objections being overruled, and exceptions taken, the court made an order directing sale of said real estate, and allowed the appellant exceptions thereto. From this order this appeal is prosecuted.

The record in this case discloses the fact that no letters testamentary were issued in the said estate after the death of the deceased until June, 1900, more than eight years after his death. If any were in fact issued to the executors named, the record does not disclose that fact. But, even if they were issued, the order issuing them was by the court subsequently declared null and void and of no effect, so that the result is the same whether they were in fact issued or not. In 1895 the legislature passed an act relative to descent of real property (Laws 1895, p. 197), the title of which is as follows: "An act in relation to descent of real estate of deceased persons and sales thereof

by executors and administrators, and quieting titles acquired by descent." Section 1 provides that when a person dies seized of lands, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges to which such real estate is liable under existing laws. Section 2 provides that the act shall apply to and govern estates of persons hereafter dying, as well as persons already deceased. Section 3 is as follows:

"No real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six (6) years from the date of the death of such decedent."

Section 6 provides that when a person has been deceased for more than six years prior to the going into effect of the act, letters may be issued within one year after the act takes effect. It seems clear that if funeral expenses may be classed as a debt against the deceased, then the facts in this case fall squarely within the terms of this act, and the court has no power to order a sale of any of the real estate of decedent, because letters were not issued within six years. Respondents, in order to overcome this, argue that funeral expenses are not in law a debt of the decedent, but are purely a part of the expenses of administration. The authorities cited do not go to the extent claimed. *In re Sullivan's Estate*, ante, p. 430, decided by this court July 2, 1901, which goes further than any of the authorities cited by respondents, it was held that the term "creditors," as used in § 6141, Bal. Code, relates only to such as were creditors of the deceased at the time of his death, or to holders of obligations created by the deceased himself. The question under consideration in that case was the right to administer upon the estate, where several persons claiming to be creditors were demanding the right of administration, and the court held that a creditor for fu-

July, 1901.] Opinion of the Court—MOUNT, J.

neral expenses was not such a creditor as was meant by that section. It was not held that these expenses were a part of the expenses of administration, nor was it held that they were not a debt against the estate. Section 6333, Bal. Code, provides that: "The debts of the estate shall be paid in the following order: 1. Funeral expenses; 2. Expenses of the last sickness; 3. Debts having preference, . . . " indicating clearly that funeral expenses are a debt against the estate and given preference in payment. The act of 1895 above referred to, was evidently passed, as the title states, for the purpose of quieting titles acquired by descent, and should be construed so as to give force to this purpose. To hold that real estate of a deceased person, under said act, is liable for debts of any class,—either of those contracted by decedent before his death, or those contracted after for funeral expenses, or in administration, after the six years had expired,—would be to defeat the object of the act. When the legislature used the language, "no real estate of a deceased person shall be liable for his debts, unless letters testamentary or of administration be granted within six years from the date of the death of such decedent," it meant to say all debts of all classes; otherwise, the question of title would not be quieted until after administration, and after all expenses thereof had been paid,—the funeral expenses, expenses of the last sickness, family allowance, and of administration. This was the very object sought to be avoided by the act. If these classes of debts may be enforced against the real estate after six years, their enforcement would in many cases, no doubt, not only cloud titles, but absolutely defeat titles. There is no question under this act that the real estate is subject to all these claims, provided letters are issued within six years of the death of the owner. It is urged that the provision in § 1 of the said

act, that the title vests "subject to his debts, family allowance, expenses of administration, and any other charge for which such real estate is liable under existing laws," indicates that the real estate is stamped with these charges. This contention is correct within the limitations provided, viz., when letters are granted within six years after the death of decedent, but after the six years no real estate shall be so charged. This construction of the act, it seems to us, is reasonable, and gives ample time for all classes of creditors to make their claims out of the estate, and ample time for administration upon the estate. In this case these claims were on file for eight years without any steps being taken to collect them. Diligence, it seems, would have required that some action be taken thereon before this length of time, and that where appellant had purchased and taken possession of the real property in good faith, and paid taxes amounting to a large sum, he should not be disturbed in his possession after such length of time.

The judgment is reversed, with directions to the lower court to sustain the objections, and dismiss the petition to sell the said real estate.

REAVIS, C. J., and FULLERTON, HADLEY and WHITE, JJ., concur.

ANDERS, J., concurs in the result.

[No. 3964. Decided July 16, 1901.]

C. L. PARKER *et al.* v. SUPERIOR COURT OF SNOHOMISH
COUNTY *et al.*

PROHIBITION, WRIT OF—WHEN LIES—JURISDICTION OF TRIAL COURT
—UNAFFECTED BY PREMATURE APPEAL.

Prohibition will not lie to restrain the superior court from further proceeding in an action to condemn a stream as a right of way for logging purposes, on the ground of a removal of the

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July, 1901.] Opinion of the Court—MOUNT, J.

cause from the jurisdiction of the trial court by appeal, where the appeal was from an order overruling a demurrer to the petition, although such demurrer raised the question of public use, and Laws 1901, p. 213, provide that "either party may appeal from the order of the court adjudicating or refusing to adjudicate that the contemplated use of the property sought to be appropriated is really a public use," since the ruling was simply upon the demurrer (which was not an appealable order), and was not an adjudication upon the facts, from which latter character of order only would an appeal lie. (ANDERS and WHITE, JJ., dissent).

CERTIORARI — WHEN LIES — ADEQUATE REMEDY BY APPEAL.

Certiorari will not lie to bring up for review the action of the lower court in permitting parties to a condemnation suit for right of way to make use thereof without first making compensation to the owners, since there is an adequate remedy by appeal from the judgment in the condemnation proceedings.

Original Application for Prohibition.

C. L. Parker, for petitioners.

Kerr & McCord and J. A. Coleman, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an application for a writ of prohibition commanding the superior court of Snohomish county and the judge thereof to desist and refrain from further proceeding in a certain cause instituted by Carstens & Earles, Incorporated, and others, in said court, against these plaintiffs to condemn a stream known as "Bear Creek," and a strip of land 25 feet wide on each side of the center line of that stream, over and through certain lands of the plaintiffs herein, as and for a right of way for logging purposes. The affidavit upon which the motion for the writ is based states, in substance: That the affiant, C. L. Parker, is one of the applicants for the writ, and the attorney for each of the applicants, and that he is one of the defendants in a certain cause in the superior court for Snohomish county, in which cause Carstens &

Earles, Incorporated, and others, are plaintiffs, and C. L. Parker and others are defendants. That said cause in said court is an action brought by the plaintiffs therein to condemn a right of way across defendants' land for the purpose of constructing, maintaining, and operating a canal, flume, or ditch, or right of way, for the purpose of floating shingle bolts. That plaintiffs' complaint was served upon affiant, as one of the defendants therein, on May 12, 1901. That the defendants demurred to said complaint on the ground that it did not state facts sufficient to constitute a cause of action. That the complaint did not show that the purpose for which defendants' property was sought to be condemned was a public use. That said demurrer was overruled by the court on May 11, 1901, and the defendants were given ten days in which to answer, and that the defendants excepted to the ruling of the court, and the exception was allowed. That notice of appeal from said ruling of the court was served by the defendants upon the plaintiffs' attorneys on May 20, 1901, and filed with the clerk of said court on May 21, 1901. That without any notice to affiant, as party to said cause, or as attorney for the defendants therein, a temporary injunction was served upon the defendant A. H. Howells, commanding him not to interfere in any manner with the driving of shingle bolts by plaintiffs through the defendants' land until the further order of the court, and commanding the defendants to show cause on May 25, 1901, before the court, why said order should not be made permanent. That on May 25, 1901, said order was modified so as to read as follows:

"It is ordered that pending the final determination of this cause the defendants and each and all of them be and they are hereby enjoined from in any manner interfering with Grace Mill Company, its agents and employees, in the matter of using the stream described in the complaint

for floating shingle bolts therein through the land of the defendants, described in the complaint, but the plaintiffs shall not trespass upon the upland bordering upon said stream, or in any manner interfere with the bed of said stream. It is further ordered that said Grace Mill Company file herein forthwith a bond for fifteen hundred dollars (\$1,500) conditioned as required by law. Said bond to be approved by the clerk of this court."

That the defendants excepted to the ruling of the court in continuing the injunction in force, and the exception was allowed. That on May 27, 1901, affiant, as attorney for the defendants in the condemnation proceeding, was served with a motion for default, and a notice that said motion would be heard on June 1, 1901, but that the hearing of said motion was continued to June 15, 1901, at which time the said court will hear the same, unless prohibited by this court from further proceeding with the cause until the appeal now pending in this court shall be finally determined. The affidavit further states "that the rights of the plaintiffs herein, as guaranteed by the constitution of this state, have been infringed and invaded by the action of the plaintiffs in said cause, and by the temporary restraining order of said superior court; that the said complaint and the plaintiffs' affidavit in support of motion for injunction show that said stream cannot be used by any person for floating shingle bolts without trespassing upon and without injuring the property of defendants in said cause; that anything that could be recovered in an action at law for trespass will not be adequate compensation for the damages to the property of these plaintiffs, and for the humiliation placed upon them, and for their wounded feelings, by reason of being compelled, by plaintiffs in said cause, and by the order of said superior court, to stand by and see their property taken and used contrary to the provision of the constitution of the state and against

their will;" that the order of said superior court in continuing said injunction in force ought to be reviewed by this court, and dissolved; that no person can use said stream without trespassing on the land of these plaintiffs, and these plaintiffs ought not to be forced to an action at law for damages for trespass. It is also stated in the affidavit that said stream is very crooked, narrow, and shallow; that affiant has measured the width of said stream in seventy-one places as it flows through defendants' land; that the narrowest place measured is eight feet in width, and the widest place measured is where the banks have been dug out by shingle bolts and washed by said creek, and that at that place said creek is twenty-four feet wide; that an average width of said stream is about twelve and one-half feet; that said stream was measured by affiant on June 9, 1901, at a time when the water was at a higher than an average stage; that said stream was measured at frequent intervals where it was easy of access, and that the depth of water in said stream for the width given did not exceed about six inches; that the plaintiffs in said action for condemnation have cut the brush along the banks of said stream, causing it to wash, and have allowed their shingle bolts to be driven by high water against the bank of the stream, causing it to cave in, thereby damaging the owners of the land; that they have chopped and removed from the bed of the stream roots which grew therein and formed a part thereof and a part of the bank, and were the private property of the owners; that shingle bolts belonging to the plaintiffs in said cause are strewn along and upon the banks of said stream, and are lodged against the bed of the stream, and are remaining therein, and on the small gravel bars, and the said plaintiffs are using the said stream and the plaintiffs' property for storing their shingle bolts, all against the will of the plaintiffs herein and

against the law and constitution of this state; that the said Grace Mill Company, through its agents and employees, has, since the restraining order of said superior court, trespassed upon the premises of these plaintiffs as described in said complaint, and has harassed and annoyed these plaintiffs.

At the time designated for the hearing of the motion for the writ of prohibition in this court, the defendants appeared by their counsel, and objected to the affidavit and papers connected therewith filed by the plaintiffs herein, on the grounds that it affirmatively appears from the affidavit and moving papers attached thereto that the plaintiffs herein made no objection to the jurisdiction of the superior court against which a writ of prohibition is sought, and that the question of the jurisdiction of said court to grant the prayer of plaintiffs' complaint was not, in any manner, raised in the lower court; that the superior court of Snohomish county is clothed with jurisdiction to hear and determine the matters and things alleged in the complaint of Carstens & Earles *et al.*, plaintiffs, v. C. L. Parker *et al.*, defendants, that the appeal referred to in plaintiffs' complaint is from an order overruling a demurrer to the complaint, which demurrer admits that the stream sought to be condemned for the floatage of timber is floatable for timber and navigable for that purpose, and that necessity exists for the condemnation thereof as provided for in the statutes of this state; that the plaintiffs have an adequate remedy at law for any and all damages that may arise by reason of the matters and things complained of; that there is pending in the superior court of Snohomish county a motion interposed by the plaintiffs herein to dissolve the temporary restraining order heretofore issued and that said motion is set for hearing on June 15, 1901; that the plaintiffs have not sought in vain for relief in

the trial court, and it does not appear that said trial court will not grant relief from the matters and things alleged by said C. L. Parker in his affidavit herein; that the acts and things of which plaintiffs complain have already been completed; and that no necessity exists or is shown for the issuance of a writ of review herein, because it appears from the said affidavit and moving papers that the matters and things sought to be reviewed are all covered by the appeal the plaintiffs allege they have presented to this court.

We are confronted at the threshold of this case with the objection of the learned counsel for the defendants that plaintiffs herein have attempted to appeal from an order overruling their demurrer to the complaint of the plaintiffs in the condemnation proceeding in the superior court of Snohomish county, and that such order is not appealable; and, inasmuch as the plaintiffs' right to a writ of prohibition depends upon whether the said cause has been transferred to this court by the alleged appeal, it is necessary to determine the question thus raised. An appeal will not lie from a mere order overruling a demurrer. It is the province of the legislature to determine from what orders and decisions an appeal may be taken, and the legislature of this state has provided, in the amendatory act of March 16, 1901, that "either party may appeal from the order of the court adjudicating or refusing to adjudicate that the contemplated use of the property sought to be appropriated is really a public use, . . . within thirty days after the entry of said order;" and the act is made applicable to all such proceedings as were pending at the time of its approval. Laws 1901, p. 213. In the complaint in the condemnation proceeding it was alleged that the use for which the property of the plaintiffs herein was sought to be taken was a public use, and the purpose for

which it was required was also set forth. Under statutes like ours, which are silent as to pleadings on the part of the defendant in condemnation proceedings, the defendant in such a proceeding is not obliged to interpose a formal answer to the petition. He may object to the condemnation, if he desires so to do, in some other way. *Where objections are apparent on the face of the papers*, they are usually raised by motion to dismiss the petition, but they may be raised by demurrer, as such a demurrer is deemed equivalent to a motion to dismiss. *Spahr v. Schofield*, 66 Ind. 168; *Lake Pleasant Water Co. v. Contra Costa Co.*, 67 Cal. 659 (8 Pac. 501); *New Orleans, etc., Co. v. Southern, etc., Co.*, 53 Ala. 211; 7 Enc. Pl. & Pr., p. 539.

It is well said by Mr. Lewis in his work on Eminent Domain, § 389, speaking of the methods of raising objections apparent on the face of the proceedings, that:

“This is ordinarily done by motion to dismiss the petition or application. If the petition is defective, a demurrer, or exceptions in the nature of a demurrer, will be proper. The same benefit may be obtained by merely resisting the appointment of commissioners or the selection of a jury on the ground that the papers do not make a case for the exercise of the power. In any of these ways the questions whether the petition and notice are sufficient, whether the purpose contemplated is a public use, whether the power to condemn for the particular purpose has been delegated, and whether the act under which the proceedings are had is valid, may be raised and decided.”

And it has been held that the question of public use or public necessity may be raised at any stage of the proceedings. *State v. Engelmann*, 106 Mo. 628 (17 S. W. 759).

In the case at bar the question whether the petition was sufficient was raised by demurrer, the defendants specially claiming that it appeared upon the face of the petition that the purpose contemplated by the plaintiffs was not a public use. It appears from the record before us that the

court heard arguments by counsel for the respective parties upon the questions whether the purpose, *as stated in the complaint*, for which the defendants' property was sought to be appropriated, was a public use, and decided the question upon the *allegations of the complaint merely*. On overruling this demurrer the learned trial court said:

"That the said complaint does state facts sufficient to constitute a cause of action; that the use proposed to be made of the property to be condemned as set forth in the plaintiffs' complaint is a public use. Therefore, that the said demurrer of the defendants to the plaintiffs' complaint ought to be and the same hereby is overruled, and the defendants are given ten days in which to answer."

This was simply a ruling upon the said demurrer, and was not an adjudication upon the facts that the use was a public use, as required by § 5640, Bal. Code. Whether the defendants filed an answer or not within the time given, it was still the duty of the court to try out the question, and be satisfied by *competent proof* that the contemplated use is really a public use. When this adjudication is made by the court, an appeal will lie. No such adjudication has been made in this case, and the lower court has jurisdiction until such appeal is taken. The ruling of the court was not a final order, and did not affect any substantial right. Even if it was error of the court to overrule the demurrer, this court will not review such error on application for a writ of prohibition. The application for the writ will, therefore, be denied.

It appears from the record herein that the trial court, on the hearing of the demurrer in question, permitted the Grace Mill Company, a plaintiff in the condemnation cause, without first making compensation to the owners, to take possession of and use the stream sought to be condemned, on filing a bond to secure the payment of resulting damages, and enjoined the defendants (plaintiffs here)

from in any manner interfering with such use until the further order of the court. The order, however, did not authorize the said company to interfere with the bed or banks of the stream, but simply to use it for the purpose of floating shingle bolts to its mill. The plaintiffs allege that this action of the court was erroneous, and they ask this court to issue a writ of *certiorari* directing said court to certify and transmit the record pertaining to said restraining order to this court, so that the alleged error may be here reviewed. But we do not think they are entitled to the last mentioned writ, for the reason that there is another adequate remedy available to them under § 6500, Bal. Code, which especially provides for an appeal in cases of this character.

REAVIS, C. J., and FULLERTON and HADLEY, JJ., concur.

ANDERS, J. (dissenting).—I am unable to assent to what is said in the opinion of the majority of the court in this case as to the scope and effect of the decision of the trial court upon the demurrer to the plaintiffs' petition in the condemnation matter. It is conceded by the majority of the court that the question whether the use proposed to be made of the property sought to be condemned as set forth in plaintiffs' petition was a public use was properly raised by defendants' demurrer, and that that question was considered and determined by the court is, in my opinion, evident from the judgment itself. It was incumbent upon the petitioners to set forth in their petition the purpose for which they were seeking to appropriate the defendants' premises, in order that the court might see whether such purpose was a public use; and they did state such purpose in their petition in no uncertain or ambiguous language. And it was the manifest duty of the court, in disposing of the demurrer, to determine the character and purpose of the contemplated use *on the allegations of the petition*

alone, assuming them to be true; and if it did not do so, it failed to determine the only question before it. But, in my judgment, the court did determine the question raised by the demurrer, and argued by counsel on both sides when it decided "that the use proposed to be made of the property to be condemned as set forth in plaintiffs' complaint is a public use." But it is said by the majority that this was simply a ruling upon the demurrer, and not an adjudication upon the facts that the use was a public use, as required by the statute. Why not an adjudication upon the facts? The facts, it is true, were admitted by the demurrer, but I am unable to comprehend how a decision based on admitted facts is in any respect different from an adjudication upon facts established by proof. The very object of evidence is to *establish* the facts alleged in a pleading, and I have hitherto considered it to be an established rule of law that it is not necessary, or even proper, to prove facts already admitted in the pleadings. If the rule were otherwise, admissions would certainly be profitless and useless.

Believing, as I do, that the lower court, in the condemnation proceedings in question, intended to and did determine and decide "that the contemplated use of the property sought to be appropriated is really a public use," I cannot avoid the conclusion that the defendants, under the provision of the statute cited in the majority opinion, had a perfect right to appeal from that "adjudication." And, if this view is correct, it follows that, after the appeal to this court was perfected, the lower court was without jurisdiction to proceed further in the premises, and ought to be prohibited from so doing.

I concur in the refusal to grant the writ of *certiorari*.

WHITE, J.—I concur in the dissenting opinion of Justice ANDERS.

July, 1901.] Opinion of the Court—MOUNT, J.

[No. 3668. Decided July 17, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. SAM SKILBRICK, *Appellant*.

LARCENY—OBTAINING MONEY THROUGH DISHONEST GAMBLING GAME
—INSTRUCTIONS.

In a prosecution for larceny for obtaining the money of the prosecuting witness by artifice in a game of poker, where it appeared from the evidence that the other players in the game were confederates and that they so manipulated the cards as to give such witness no chance of winning, but he was induced by one of the confederates to bet his money on his hand under the assurance that he held the winning one, all the confederates knowing what such witness had in his hand, a requested instruction was properly refused, where the court was asked to charge that if the jury found the prosecuting witness "engaged in a game of cards, and intended to bet and win or lose his money bet, as money is usually lost or won at cards, and allowed the money to be taken from the table without objection on his part, because he had lost the bet, you will find the defendant not guilty, whatever the character of the game may have been."

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

John F. Dore, J. E. Hawkins and Edward E. Brennan,
for appellant.

Walter S. Fulton, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

MOUNT, J.—Appellant was convicted in the superior court of King county of the crime of larceny, and from a judgment and sentence appeals to this court.

It appears from the evidence that one Thomas Daley, who was a country boy, while in the city of Seattle was met by one Andrew Samson, who was a stranger to him. Daley and Samson, after some conversation, went to a saloon, and into a small room, and were discussing some por-

tion of the state of Wisconsin where Daley once resided; Samson claiming that he was also from that state. While thus engaged, they were joined by one Herman Hilger and Skilbrick, the appellant. A game of cards was proposed, and Daley, after the other three had played for a little time, was induced also to play. The game was what is commonly known as poker. Upon the deal the cards were so manipulated that Skilbrick, the appellant, held four tens, Daley four queens, and Hilger four kings. Samson's hand being of no value, he threw it aside, but persuaded Daley to show him his hand. Samson then told Daley that he held the best hand, to get all the money he could, and wager it on the hand. Each of the parties then placed his cards in an envelope, and Samson, taking the remainder of the cards, went with Daley and Hilger to a bank, where Daley had his money. After getting the money, they went back to said saloon, where appellant had remained, and proceeded to bet on the hands. When the money, amounting to \$61 for each of the three players, was all on the table, and the cards displayed, Samson "grabbed" the money, and Hilger took it from him. Thereupon all separated. Daley immediately informed against the parties, who were all arrested, and charged jointly with the crime of larceny. Separate trials were had.

Appellant requested the court to give to the jury the following instruction:

"If you find the prosecuting witness Daley engaged in a game of cards, and intended to bet and win or lose his money bet, as money is usually lost or won at cards, and allowed the money to be taken from the table without objection on his part because he had lost the bet, you will find the defendant not guilty, whatever the character of the game may have been."

There can be no other conclusion from the evidence in the case than that Hilger, Samson, and the appellant, Skil-

brick, were confederates; that the game was a dishonest game; that Daley had no chance of winning; that the confederates knew what Daley had in his hand; and that there was no element of chance for them in the game. Daley was entirely ignorant of the character of the game. He testified that he believed it to be an honest game of poker. Rapalje, in his work on Larceny and Kindred Offenses (at § 14), says:

“If by trick or artifice the owner of property is induced to part with the custody or naked possession of it to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny. Thus it is larceny where the defendants so fraudulently conduct a gambling game or lottery as to give the prosecutor no chance of winning, and he parts with his money through fraud or fear.”

See, also, McClain, Criminal Law, § 560.

When Daley placed his money on the hazard of the cards, he did not intend to part with the title, unless it was fairly won by his opponents. When Samson, Hilger, and Skilbrick knew, before the cards were dealt, or afterward by discovery, that Daley was to lose his money through their manipulations, and where they induced him into the game, and one of them, by telling him he had the best hand, persuaded him to place his money on the table, for the purpose of obtaining his money, as they evidently did in this case, it was as much larceny as though they had induced him to lay his money on the table for them to examine and then had taken it by some sleight-of-hand performance, which Daley did not understand, or by force under his protest. The object of the conspirators was to get the money. That they got possession of it through a trick or through fraud, by leading Daley to believe he would stand an equal chance of winning when he had none, or that they got it by taking it without his consent,

makes no difference; the crime would be larceny in either event. *Miller v. Commonwealth*, 78 Ky. 15 (39 Am. Rep. 194); *People v. Rae*, 66 Cal. 423 (6 Pac. 1, 56 Am. Rep. 102); *Loomis v. People*, 67 N. Y. 322 (23 Am. Rep. 123); *People v. Shaw*, 57 Mich. 403 (24 N. W. 121, 58 Am. Rep. 372).

The instruction complained of assumes that where a person loses at a dishonest game, not knowing it to be such, the person conducting such game is not liable for larceny. The weight of authority does not support the appellant's contention. It was not error of the court to refuse the instruction.

The cause is therefore affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, HADLEY and WHITE, JJ., concur.

[No. 3674. Decided July 17, 1901.]

CHERRY POINT FISH COMPANY, *Respondent*, v. E. D. NELSON *et al.*, *Appellants*.

FISHERIES—TRAPS—DEPTH OF WATER—CONSTRUCTION OF STATUTE.

Laws 1899, p. 194, § 1, which provides that it shall be unlawful for any person to construct, operate, and maintain in any of the waters of the state, "at a greater depth than sixty-five feet at low tide," any pound net or trap for the purpose of catching salmon or other food fishes, was intended by the legislature, in view of all the provisions of the act, to prohibit the construction of such fishing appliances in waters of greater depth at low tide than sixty-five feet.

SAME—EVIDENCE OF DEPTH—GOVERNMENT TIDE TABLES.

The tide tables prepared by the United States government for the use of navigators on the waters of Puget Sound are competent evidence for the purpose of finding by their aid the depth of the water at a given time and place, under normal conditions, in order to determine whether a fish trap had been constructed in waters of greater depth than sixty-five feet at

July, 1901.] Opinion of the Court—FULLERTON, J.

low tide, in contravention of the act (Laws 1899, p. 194), relating to the protection and propagation of food fishes.

SAME—INJUNCTION AGAINST MAINTENANCE—SUFFICIENCY OF FINDINGS.

A judgment enjoining the maintenance and operation of a fish trap by defendants is supported by a finding of the court that such trap interfered with the common right of fishery as regulated by the statutes of the state; that it is an infringement upon the location of plaintiff and materially injures and damages the plaintiff, and is, as to it, a nuisance in fact, since such finding is sufficient to show special injury, warranting plaintiff in maintaining injunction against defendants in its own name.

Appeal from Superior Court, Whatcom County.—Hon. HIRAM E. HADLEY, Judge. Affirmed.

Newman & Howard and *Dorr & Hadley*, for appellants.

Kerr & McCord, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The respondent is the locator and in possession of a certain pound net fishing location situate in the waters of Puget Sound off the mainland between Cherry Point and Sandy Point, in Whatcom county, and maintains and operates thereon a pound net, for the purpose of catching salmon, under a license issued to it by the fish commissioner of the state. In 1899 the appellants procured from the fish commissioner a pound net license, and thereafter indicated a location and constructed a pound net at a place in front of, and some three thousand feet distant from, the respondent's trap. The respondent brought this action to enjoin the maintenance and operation of the trap, and to require its removal. It alleged that the trap was constructed in prohibited waters, being constructed at a place where the water was over sixty-five feet in depth at low tide, and that the trap was specially injurious to the respondent because it cut off the approach

to the respondent's trap, and caught and drove away fish which would otherwise be caught therein. Issue was taken upon the allegations of the complaint, and a trial had resulting in a judgment in accordance with the prayer of the complaint. The evidence introduced on the trial of the cause is not in the record; the appellants relying for reversal upon certain findings of fact made by the trial court. These findings are as follows:

" . . . That the construction and maintenance of said trap or pound net by defendants at the place aforesaid, is in water of a greater depth than 65 feet at low tide and is a general public nuisance and interferes not only with the common fishery rights as regulated by the laws of the state of Washington, but is especially in violation of and an infringement upon the rights of plaintiff in and to its said location and of the statutes of the state of Washington; that the location of plaintiff, after a large expenditure of money, has been demonstrated to be valuable and the maintenance of defendants' trap upon said location is an infringement upon the rights of the plaintiff and materially injures and damages plaintiff and that said location of defendants, as to this plaintiff, is a nuisance in fact."

"That the depth of water at low tide at and upon the defendants' location numbered 2321, at the points hereinafter indicated, is as follows: At the inner or shore end, 66.7 feet; at a point about 330 feet or one-fourth of the way outward therefrom, 67.4 feet; at a point 660 feet therefrom, or one-half of the way out, 68 feet; at a distance of 990 feet therefrom, or three-fourths of the way out, 68.8 feet; at the pot end of the trap, 70.5 feet; that the foregoing measurements show the depth of water at said location at low tide and that the whole of said location of defendants is in water of a greater depth than that in which trap fishing is permitted by the laws of the state of Washington, and that said trap is within waters wherein fishing with pound nets or fish traps is prohibited by the statutes of this state; that the foregoing measurements are

July, 1901.] Opinion of the Court—FULLERTON, J.

based upon the measurements made at various times and on various dates by competent civil engineers, who took said measurements, and were reduced according to the data contained in the tide tables prepared by the United States Coast and Geodetic Survey and issued by the government of the United States; that said measurements as made by said civil engineers were reduced according to the rules contained in said tide tables to the lowest low water for any given date in the year 1900, as shown by said tide tables; that said tide tables, under normal conditions, are accurate and correct and contain the only accurate data and information upon which the depth of water at low tide can with any degree of certainty be computed or determined; that the height of water is frequently affected by the winds; that winds from the outward will pile the water up in the Gulf of Georgia and Puget Sound generally and the wind from the shore will drive the water outward in a corresponding degree; that the winds affect the surface of the water both at high tide and at low tide to the extent of from two to four feet, depending upon the strength, continuance and velocity of the wind; that there is a difference between high water and high tide and low water and low tide, due to the action of the winds as aforesaid; that no uniform system of determining the depth of water at either low tide or high tide wherein fish traps may be maintained can be constructed or adopted, unless the United States Government Tide Tables are utilized and given credibility; that said tide tables, under all normal conditions, are accurate and correct and the depth of water must be determined therefrom by competent measurements and reduced to low tide in accordance with the data contained in said tide tables."

"That on the third day of December, 1899, the fishing location claimed by the defendant, E. D. Nelson, under pound net license No. 2321, was sounded, and the depth of water as the persons measuring it believed it to be from their measurements made at the three location piles at said location was as follows, to-wit: At the inner pile, 63 and 5-10 feet; at the middle pile, 64 and 5-10 feet, and at the outer pile, 66 feet, and said defendant believed said

measurements to be correct. That at the time said measurement was made at the said outer pile the tide had been flooding at that point for about forty minutes and the water had raised several inches. That the bottom at all points along said location is composed of extremely soft mud, and that the measurements thus taken were from the foot of the lead as it rested on the bottom to the surface of the water at the time said measurements were taken."

The act relating to the protection and propagation of food fishes (Laws 1899, p. 194, § 1) makes it unlawful for any person to construct, operate, and maintain in any of the waters of the state, "at a greater depth than sixty-five feet at low tide," any pound net, etc., for the purpose of catching salmon or other food fishes. The trial court found, it will be noticed, that the appellants' trap is constructed in water of greater depth than sixty-five feet at low tide, but did not find that the trap as constructed is in water "at a greater depth than sixty-five feet." The appellants contend that the finding is for this reason insufficient to support the judgment. They argue that the statute does not prohibit the construction of a trap in waters which are sixty-five feet or more in depth, but only prohibits the construction of a trap deeper into the water than sixty-five feet, measured from the surface at low tide; in other words, a trap may be constructed in any depth of water so long as it does not extend downwards from the surface of the water at low tide a greater distance than sixty-five feet. While the language used in the particular section of the act cited may lend color to the construction put upon it by the appellants, a consideration of the subject-matter of the act, and the language used in other sections, to our minds precludes the idea that such was the legislative meaning. The act in question has as its principal object the protection of food fishes. It absolutely pro-

July, 1901.] Opinion of the Court—FULLERTON, J.

hibits the construction of any fixed appliance, set lines excepted, in any of the waters of Puget Sound within three miles of the mouth of any river flowing therein; clearly showing that it was the intention of the law makers to provide for an open and unobstructed passage way for the fish to enter these rivers, which are their natural spawning places. If traps are permitted to be constructed in waters of any depth, it is easy to see, notwithstanding the limitations put upon the length of the lead lines and the proximity to each other within which they may be constructed, that it would be possible to so bar these passage ways as to practically cut off the approach of the fish to the mouths of these streams. More than this, the legislature understood the method of constructing the enumerated fishing appliances. A pound net, such as the appellants constructed, must of necessity extend the entire depth of the water. It consists not only of the net in which the fish are caught, but also of a lead to guide the fish into the net. This lead may be lawfully two thousand five hundred feet in length, and is constructed by driving a series of piles into the ground under the water at from ten to thirty feet apart, securely bracing them, and stretching thereon wire or cotton webbing. While it is possible to so place the webbing as not to extend it to a greater depth in the water than sixty-five feet at low tide, it is impossible to so construct the trap as to limit the distance the piles extend into the water, and these are as much a constituent part of the trap as is the wire or cotton webbing. If it be true that the act was not framed with much regard to the niceties of the language, it is only an additional reason for not following too closely the literal meaning of the words used. In such a case the legislative will is to be ascertained, not from the literal meaning of the words of the statute alone, but from the text as a whole interpreted in view of the general object and purpose of the act.

From the findings it appears that the trial court, in determining the depth of the water, did not have before it evidence of an actual measurement made at the lowest low tide for any given year, but that such depth was determined from measurements made by competent civil engineers at various times and various stages of the tides, and reduced to lowest low tide for the year 1900 according to data and rules contained in the United States tide tables, prepared by the government for the use of navigators on the waters of Puget Sound. The appellants contend that this finding was based upon incompetent evidence, and that, as the court found that the appellants believed, from the measurement made by them, that the water was not of the prohibited depth, the judgment should have been in their favor. Passing over the question whether the appellants are entitled to have this question reviewed in this court at all, inasmuch as they have not brought the evidence before us, we cannot think these tables were incompetent as evidence, or that to find the depth of the water at a given time by their aid was, as the appellants contend, mere speculation or conjecture. The court found that the tables were correct and accurate under all normal conditions. By normal conditions the court meant those conditions prevailing when the forces which produce the tides act of and within themselves, unaffected by the direction and force of the winds. Manifestly, the words low tide, as used in the act, mean low tide under normal conditions. The legislature was laying down a rule. It intended to fix a point from which measurements could be made to ascertain the depth of the water at any given place and at any given time. It authorized the location of a fishing site, and the construction of a trap thereon, at any season of the year. It would be to convict the legislature of an absurdity to hold that the lowest low tide

July, 1901.] Opinion of the Court—FULLERTON, J.

could not be determined by measurements made at any stage of the water and reduced to low tide by the rules laid down by the recognized standards, or to say that the act referred to other than normal conditions. In these waters, the lowest tide for any given year occurs but once, and, if the courts are to be confined to actual measurements made at such a time, when the question of the depth of the water is before them for determination, the act is practically nullified in its operation.

Lastly, it is contended that the finding of the trial court on the question of special injury to the respondent is insufficient to support the judgment. The court found that the appellants' trap interfered with the common right of fishery as regulated by the statutes of the state; that it is an infringement upon the location of respondent, and materially injures and damages the respondent; and that the trap, as to the respondent, is a nuisance in fact. Whether the evidence justified these findings is a question not before us. In themselves they justify the conclusion that the trap is a public nuisance; that the respondent suffers, because thereof, special, actual, and material damages, differing in kind from that suffered by the general public. This is sufficient to enable it to maintain injunction against the appellants in its own name, and justifies the judgment rendered.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and MOUNT, JJ., concur.

25	566
29	114
129	697
29	708
25	566
38	535

[No. 3928. Decided July 18, 1901.]

HARRY KRUTZ, *Appellant*, v. LUCIE ISAACS *et al.*, *Respondents*.

ACTION FOR QUIETING TITLE—LIMITATIONS.

Under Bal. Code, §§ 5500, 5501, which provide that in an action for the recovery of the possession of real estate the plaintiff may have judgment quieting or removing a cloud from plaintiff's title, but that such action, where possession has been taken under execution sale, shall be brought within seven years next after possession being taken as aforesaid, and that when the possessor shall acquire title after taking such possession "the limitation shall begin to run from the time of acquiring title," the statute of limitations would not begin to run against plaintiff until his actual ouster and the taking possession of the premises by defendants, where possession was not taken until some time subsequent to the sheriff's sale.

SAME.

Where an action is brought under Bal. Code, §§ 5500, 5501, both for possession and the quieting of title, the limitation upon such actions of seven years specially provided therein governs instead of Bal. Code, § 4797, subd. 1, which fixes the limitation period at ten years in "actions for the recovery of real property, or for the possession thereof."

JUDGMENTS—INVALIDITY—REMEDY FOR SALE UNDER VOID JUDGMENT.

The remedy of the grantee of a judgment debtor, whose land has been sold under a void judgment against his grantor, is not by bringing proceedings to vacate the judgment under Bal. Code, § 5153 *et seq.*, but is governed by *Id.*, § 5500 *et seq.*, which authorize actions to recover possession of real estate and to quiet title thereto.

SAME—FAILURE TO SERVE PROCESS—CONCLUSIVENESS OF SHERIFF'S RETURN.

In an action for equitable relief against a judgment which had been rendered without the court's having acquired jurisdiction of defendant's person because of a failure to properly serve him with process, the return of the sheriff that he made such service by leaving a copy with a person of suitable age at the residence of defendant is subject to attack upon the question of residence, since a sheriff's return is conclusive only as to matters peculiarly within his own knowledge.

July, 1901.] Opinion of the Court—HADLEY, J.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Reversed.

C. B. & W. H. Upton, for appellant.

Thomas & Huffman, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by the appellant against respondents to recover possession of certain real estate situated in Walla Walla county, and also to remove a cloud therefrom, and to quiet appellant's title. The complaint alleges, in substance: That on the 19th day of May, 1894, one Williams was the owner of said land and in the possession thereof, and that on said day, for a valuable consideration, he conveyed the same by warranty deed to plaintiff and put plaintiff in exclusive possession of the whole thereof. That plaintiff ever since has been, and now is, the owner of said land, and entitled to the immediate and exclusive possession of the whole thereof. That said deed was duly recorded on the 24th day of May, 1894. That on the 2d day of October, 1893, one Henry P. Isaacs filed a complaint in the superior court of Walla Walla county against said Williams, in which he prayed for judgment for money only. That no service of any summons under said complaint was ever made, either actually or constructively, or at all, upon said Williams, and he at no time had any knowledge or notice of the pendency of said action, or of any of the proceedings therein. That said Williams never appeared or gave notice of appearance in said action, either in person or by attorney, and said court never acquired jurisdiction of his person, or of the subject matter of said action, or of said land. That all of said facts were at all the times mentioned well known to said Isaacs and to all the defendants. That, neverthe-

less, the then sheriff of said county made in said action the two returns following, to-wit:

“I, C. C. Gose, sheriff of Walla Walla county, Washington, do hereby certify that I served the within summons on the within named defendant F. L. Williams, in Walla Walla county, Washington, on the 11th day of October, 1893, by then and there delivering to and leaving with L. D. Robertson, at the house of F. L. Williams’ usual place of abode, he being a person of suitable age and discretion, then resident therein, a copy of said summons duly certified to be such true copy by B. L. Sharpstein, one of the attorneys for plaintiff, and at the same time and place with said copy of said summons I delivered to and left with the said L. D. Robertson, personally, a true copy of the complaint in said action, duly certified to be such copy by B. L. Sharpstein, one of the attorneys for plaintiff, to the said defendant not being found after diligent search.”

“I, C. C. Gose, sheriff of Walla Walla county, state of Washington, hereby certify that I served the within summons on the within named defendant F. L. Williams in Walla Walla county, state of Washington, on the 11th day of October, 1893, by then and there delivering to L. D. Robertson at the house of the said F. L. Williams’ usual abode in said county of Walla Walla, the said F. D. Robertson being a suitable person over the age of 21 years, a true copy of said summons, duly certified to be such true copy by B. L. Sharpstein, one of the attorneys for the plaintiff, and at the same time and place with said copy of said summons I delivered to the said L. D. Robertson, a person of suitable age and discretion at the house of the usual place of abode of the said defendant, in said county, personally, with said copy of said summons, a true copy of the complaint in said action duly certified to be such copy, by B. L. Sharpstein, one of the attorneys for the plaintiff, the said defendant not being found after diligent search.”

That each and both of said returns were erroneous and false, in this, to-wit: That the place where said sheriff delivered to said Robertson copies of said summons and complaint was not the house or usual place of abode of

July, 1901.] Opinion of the Court—HADLEY, J.

said Williams, but was the house and abode of said Robertson only; that said Williams never did at any time abide at said house where said copies were delivered as aforesaid, but on said 11th day of October, 1893, and at the time of said alleged service of said summons and complaint, and for a long time prior and subsequent thereto, said Williams was absent from the state of Washington, and had his house and his usual abode without said state; that said Robertson was not a suitable person in the premises, in that he did not reside at, and was never present at, the usual place of abode of said Williams. That, notwithstanding the premises, on November 6, 1893, said court, by the procurement of said Isaacs and his attorneys, purported to make, and entered in its journal, a certain order wherein said court purported to adjudge that said Isaacs have and recover from said Williams in the action aforesaid the sum of \$487.87, together with attorney's fees and costs. That on October 7, 1897, a writ of execution issued from said court on said pretended judgment, and was levied on said land, and thereafter, on the 6th day of November, 1897, the sheriff of said county, by alleged authority of said writ, purported to sell said land to said Isaacs for the sum of \$771.40, credited on said pretended judgment, and afterwards said sheriff issued to said Isaacs his deed as such sheriff, wherein and whereby he purported to convey said land to said Isaacs. That afterwards, and prior to the commencement of this action, said Isaacs, claiming under said sheriff's deed, unlawfully and forcibly entered upon and took possession of said land, and the whole thereof, and unlawfully and forcibly ousted and ejected the plaintiff therefrom, and until his death continued unlawfully and forcibly to hold possession of said land, and withhold the same from plaintiff. That said Henry P. Isaacs died intestate on the 14th day of July, 1900; that the defendant

Lucie Isaacs is the widow, and the other defendants are the children, respectively, of said Henry P. Isaacs, and that said defendants are the sole heirs of said Henry P. Isaacs, and are in possession of said land, and still continue to unlawfully and forcibly hold possession thereof, claiming to own the same under said sheriff's deed, and refuse to deliver possession to plaintiff, although possession has frequently been demanded. It is further alleged that administration upon the estate of said Henry P. Isaacs is now pending, and that certain of the defendants are the duly qualified and acting administrators thereof; and, further, that neither plaintiff nor said Williams had any knowledge or notice of the matters alleged prior to May 20, 1894, or prior to the delivery of said sheriff's deed to said Isaacs after the sale in 1897. The complaint concludes with a prayer for judgment awarding plaintiff possession of said land, and adjudging said writs, returns, pretended judgment, and sheriff's deed, and every claim asserted by defendants as aforesaid, to be a cloud upon plaintiff's title to said land, and removing all said clouds, and adjudging plaintiff to be the sole owner of said land. To said complaint the defendants interposed a demurrer upon the following grounds: (1) That the court has no jurisdiction of the subject matter of the action; (2) that said action has not been commenced within the time limited by law; (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was, by the court, sustained, to which ruling plaintiff excepted. The plaintiff elected to stand upon his complaint, and declined to further plead. Thereupon judgment dismissing the action and for costs against the plaintiff was entered. From said judgment plaintiff has appealed.

This action is brought under §5500, Bal. Code, which provides that in an action for the recovery of the possession

July, 1901.] Opinion of the Court—HADLEY, J.

of real estate the plaintiff "may have judgment in such action quieting or removing the cloud from plaintiff's title." In effect this provision existed in territorial days, but the statute was enlarged in 1890. The territorial court interpreted the former statute in *Smith v. Wingard*, 3 Wash. T. 291, 298 (13 Pac. 717), as follows:

"The action therein contemplated is the common law action of ejectment, with the added incident of determining in the action the paramount legal or equitable title, and with the departure of permitting the action to be brought against one not in possession, but who claims title to or interest in the land."

To the same effect is the decision of this court in *Reichenbach v. Washington, etc., Ry. Co.*, 10 Wash. 357 (38 Pac. 1126). Section 5501, Bal. Code, provides as follows:

"All actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title."

The complaint in this case shows that the sheriff's sale under which respondents claim title was made November 6, 1897, but that the actual ouster of appellant and the taking possession by respondents' ancestor occurred after that time. The statute of limitation, under the provisions of the above quoted section, did not, therefore, begin to run until possession was taken by respondents or their

ancestor, which was some time after November 6, 1897. This action was begun in November, 1900, and is not, therefore, barred by the statute. It is suggested in argument by appellant's counsel that the general statute of limitation as found in subd. 1 of § 4797, Bal. Code, may apply here. The language of that section is, "Actions for the recovery of real property, or for the recovery of possession thereof," and the limitation period is fixed at ten years. The subject under consideration in that section seems to be merely that of the recovery of possession. But § 5500, Bal. Code, cited above, provides for more than the mere recovery of possession, viz. the removal of a cloud and the quieting of title to the land in controversy. In *Smith v. Wingard, supra*, the court declared the primary object of the law to be to determine the question of title to the land. At page 298 of the opinion in that case, written by Mr. Justice TURNER, it is said:

"While the primary object of the law as we find it in this chapter is to determine the question of title to the land, that question is to arise, we think, in litigation about the possession of the land."

If the determination of the question of title is the primary object of this law, we then have § 5501, Bal. Code, cited above, fixing the limitation for actions brought thereunder. That section is found in chapter 11, p. 20, § 1, of the Session Laws of 1893, and is entitled: "An act to quiet possessions and confirm titles to land." The subject matter of each statute relates to the quieting of title to lands. The last named section hereinbefore quoted recognizes the possessor's claim of title as an essential factor in determining when the statute begins to run, since it provides that, if the title under which he claims is acquired after he comes into possession, the statute shall begin to run from the time the title is acquired, and not

July, 1901.] Opinion of the Court—HADLEY, J.

from the time he goes into possession. We, therefore, think the limitation period of seven years, as fixed under § 5501, applies here. It has been held that a suit by the owner of the fee in possession to determine an adverse claim to or interest in real property, or to remove a cloud from the title thereof, cannot be barred by the statute of limitations while the adverse claim or cloud exists, because the right to have the same removed is a continuing right. See *Meier v. Kelly*, 22 Ore. 136 (29 Pac. 265). In 12 Am. & Eng. Enc. Law, p. 606, the rule is stated that lapse of time forms no bar to a bill to quiet title by a complainant in possession, but when the plaintiff is out of possession the defense of laches is available, for the reason that if his right to maintain an action of ejectment is barred by the statute of limitations, a court of equity will not grant a decree quieting his title, such relief being without value when the plaintiff cannot recover possession under the title. The statute invoked here provides for relief of both a legal and an equitable nature, viz., possession and the quieting of title,—a new and combined remedy, created by the legislature; and it was evidently the intent of the legislature that, when these questions are involved together as rights sought to be enforced by one not in possession, they must be at rest after the lapse of seven years. The contention of respondents is that appellant should have commenced this action within one year from the rendition of the judgment in favor of Isaacs and against Williams, and they invoke the provisions of §§ 5153 *et seq.*, Bal. Code, which relate to proceedings for the vacation and modification of judgments. We do not think those provisions are applicable to this case, for the reason that the action is brought to recover possession of real estate and to quiet title thereto. The Isaacs judgment may be an incident to be considered in determining the controversy, but the complaint shows

that at the time the sale was made under that judgment, and for a long time prior thereto, appellant was in possession of the land. He was not only in possession, but was the holder of the fee simple title by deed from Williams. The most that can be said in favor of respondents is that appellant was the owner and in possession, subject to whatever rights Isaacs had under his judgment. If, under the theory of the complaint, the judgment was void, it constituted no more than a cloud upon appellant's title; and, since he was in possession, under the rule above stated, he was not required by lapse of time to bring an action to remove a mere cloud. He was not a party to the action in which the judgment against Williams was rendered, and the procedure under the statute for the vacation of judgments evidently contemplates that the petition shall at least ordinarily be by one who is a party to the record. Appellant could not compel Williams to move against the judgment, and it is doubtful if appellant, being a stranger to the record, would have been heard to do so himself. Again, it is provided by the statute that, when the petition is by a defendant, it must show facts constituting a defense to the action. Possibly Williams may have had no defense to the subject matter of the action, and in that event neither he nor appellant could have complied with the statute by showing the existence of such defense. But the case presented by the complaint is that of an attack upon an execution sale, which it is claimed was attempted to be made under a void judgment. If the judgment was void, there was in fact no judgment, and, whether Williams had or had not a defense to the subject matter of the action, he had a right to convey the land at a time when there was no judgment, and appellant, as a grantee in possession, was not chargeable with any duty to move for the vacation of a void judgment. When, however, he found himself

July, 1901.] Opinion of the Court—HADLEY, J.

ousted of possession through an attempted sale under the alleged void judgment, he was subject to the statute of limitation above discussed, and had seven years within which to bring his action for possession and to remove the alleged cloud under which respondents claim to hold. Does the complaint state other facts sufficient to constitute a cause of action? Its averments show that appellant was ousted of the possession of land which he owned, and that respondents' claim of right is based upon an execution sale. It is alleged that there was never any service of summons upon the judgment debtor in the action wherein the judgment was rendered under which the execution issued, and that the judgment debtor had no knowledge of the pendency of the action. Certain returns of the officer, showing the manner of attempted service, are set out in full in the complaint. If there was no legal service of summons, it needs no argument to show that the judgment rendered was void, and that all proceedings thereunder were without force and effect. The manner of service certified by the officer was by leaving a copy of the summons and complaint with a person of suitable age at the usual place of defendant's abode,—a service declared by statute to be sufficient upon which to found a personal judgment. The complaint negatives the fact that the place where summons was left was the defendant's usual place of abode, and alleges that he never at any time resided at said place, and that his usual place of abode at that time, and for a long time prior thereto, was without the state of Washington,—all of which facts, it is alleged, were well known to the plaintiff in that action; but that the plaintiff, knowing these facts to be true, procured the said returns to be made, and afterwards procured said judgment to be entered on the strength of said returns. Under these circumstances respondents contend that the officer's return must be taken

as conclusive, and that it cannot be attacked. The rule as to the conclusiveness of the officer's return is subject to limitations. As stated in 22 Am. & Eng. Enc. Law, p. 198:

“There is another limitation arising in the distinction to be made between facts which are presumed to be peculiarly within the knowledge of the officer, and such as are not. Thus, he is presumed to know best the time, place, and manner of service, but not all other facts stated in his return.”

Numerous authorities are cited in support of the above statement in the text. The case of *Bond v. Wilson*, 8 Kan. 228 (12 Am. Rep. 466), is there cited, and the reason of the rule is stated in the course of the opinion in that case. The court, at pages 230 and 231 of the opinion, says:

“In the systems of practice adopted in this country, the safeguards being removed, it has become necessary to adapt the rule to the altered condition of the law. The sheriff not only executes original process by service upon the defendant personally, but by leaving a copy at his usual place of residence. The sheriff also determines whether a minor is over fourteen years of age, and serves accordingly. He also determines who is president, mayor, chairman, or chief officer of a board of directors; and also what is the usual place of business of a corporation, and who has charge thereof, and serves his process accordingly. Is his determination of such questions final? Must the defendant suffer the judgment to stand in such cases, and resort to his remedy against the officer? . . . We find upon examination that the courts have generally held the sheriff's return on *mesne* and *final* process conclusive between the parties and privies, though this is by no means a rule of universal application; but that in cases of *original process* there has been a general disposition to let in the truth. . . . we know of no statute that makes a sheriff a final and exclusive judge of where a man's residence is, or what is the age of a minor, or who are the officers of a corporation, or where their place of business is; and

July, 1901.] Opinion of the Court—HADLEY, J.

when the statute made it the duty of the sheriff to ascertain these facts it did not make his return of such facts *conclusive*. Of his own acts his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge he must act from information, which will often come from interested parties, and his return thereof ought not to be held conclusive."

To the same effect are the following cases: *Crosby v. Farmer*, 39 Minn. 305 (40 N. W. 71); *Randall v. Collins*, 58 Tex. 231; *Nietert v. Trentman*, 104 Ind. 390 (4 N. E. 306); *Grady v. Gosline*, 48 Ohio St. 665 (29 N. E. 768); *Godwin v. Monds*, 106 N. C. 448 (10 S. E. 1044); *O'Conner v. Wilson*, 57 Ill. 226; *Rape v. Heaton*, 9 Wis. 328 (76 Am. Dec. 269); *Dobson v. Pearce*, 62 Am. Dec. 158, note.

This is an attack upon the judgment and all proceedings thereunder. If respondents hold any title to the land, it is derived from the judgment and sale thereunder. Appellant has brought his action as authorized by statute, and seeks what may be termed both legal and equitable relief. That which may be said to appeal to the equity side of the court relates to the alleged cloud upon his title, created by the said judgment. We think, therefore, that the remedy sought here comes within that outlined in § 495, of 2 Freeman on Judgments (4th ed.). It is there stated as follows:

"A judgment pronounced without service of process, actual or constructive, and without the defendant's knowing that a court has been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs, and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues

upon the question of service of process, and of the trial of those issues, after full opportunity has been given to those who seek to sustain, as well as to those who seek to avoid, the judgment. If, at such trial, it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains."

We think, therefore, that the demurrer to this complaint should be overruled, and an opportunity given appellant to submit evidence, under the averments of his complaint, as to the facts concerning service of summons in the former action.

The judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer.

REAVIS, C. J., and ANDERS, MOUNT and WHITE, JJ., concur.

[No. 3915. Decided July 18, 1901.]

J. A. STRAIN, *Appellant*, v. S. S. YOUNG *et al.*, *Respondents*.

ELECTIONS—INCREASE OF COUNTY INDEBTEDNESS BY VOTE—WHAT CONSTITUTES A THREE-FIFTHS VOTE—CONSTRUCTION OF CONSTITUTION.

Under art. 8, § 6 of the constitution, forbidding any county to become indebted in excess of one and one-half per centum of the taxable property in such county, "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," it is not necessary that a proposition for increasing the county's indebtedness submitted at a general election should obtain three-fifths of the highest vote cast at such general election, but no more is required than that such special proposition, in order to carry, receive three-fifths of the votes cast by the voters who specially vote thereon.

July, 1901.] Opinion of the Court—HADLEY, J.

Appeal from Superior Court, Garfield County.—Hon. CHESTER F. MILLER, Judge. Affirmed.

Frank Cardwell, for appellant.

Gose & Kuykendall, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by appellant against respondents, who constitute the board of commissioners of Garfield county. It is alleged in the complaint that on the 13th day of July, 1900, the court house and all county buildings of Garfield county were totally destroyed by fire, and that said county cannot secure buildings for county purposes except by building them. A resolution passed by the board of county commissioners of said county on the 9th day of August, 1900, is set out in the complaint, which resolution is to the effect that the question of contracting county indebtedness and issuing bonds of said county in the sum of \$20,000 to secure money for the purpose of purchasing suitable grounds and erecting thereon and equipping public buildings for the use of said county be submitted to the voters of said county at the general election to be held on the 6th day of November, 1900. It also appears from the complaint that due notice of the submission of said question was given as required by law, and that at said election there were cast in said county four hundred and sixty-two votes, and no more, “for incurring county indebtedness and issuing bonds in the sum of \$20,000 for court house and other county purposes,” and two hundred and twenty-six votes, and no more, “against incurrning county indebtedness and issuing bonds in the sum of \$20,000 for court house and other county purposes.” It also appears that at said election there were cast in said county one thousand twenty-

three votes, and no more, for presidential electors. Said vote upon the question of incurring indebtedness was canvassed at the same time and place as the vote for presidential electors and state and county officers, and thereafter the board of county commissioners of said county declared that three-fifths of the voters of the county had voted in favor of incurring county indebtedness in the sum aforesaid. Afterwards the said board of commissioners caused notice to be given of a time and place when sealed bids would be received for the sale of bonds of said county in the sum of \$20,000, to be issued for court house purposes. Bids were accordingly submitted and afterwards said board of commissioners entered into a contract with Roberts Bros. of Spokane, Washington, wherein and whereby it was agreed to sell to them \$20,000 of the bonds of said county, in the denomination of \$1,000 each, bearing four and one-half per cent. interest, at a par valuation, with \$75 premium. It is alleged that said Roberts Bros. now decline to receive and pay for said bonds for the reason, as they claim, that, inasmuch as three-fifths of those who voted for presidential electors did not vote for said bonding proposition, the said proposition failed to carry. It is also alleged that said board of commissioners are claiming and asserting that said proposition was duly carried, and that the board are now negotiating with other persons for a sale of said bonds, and are threatening to sell, and will issue, sell, and deliver, them, unless restrained by an order of court; that said board have already entered into a contract for the construction of a court house at a cost of \$18,000, and said court house is now under process of construction. The value of the taxable property of said county, as shown by the last assessment for state and county purposes, is alleged to be \$1,777,460, and the existing indebtedness is \$26,771.73. There are taxes due and de-

July, 1901.] Opinion of the Court—HADLEY, J.

linquent to said county in the sum of \$17,385. The county holds warrants against Asotin county aggregating \$1,000, and there is cash on hand belonging to the county in the sum of \$20,131. Appellant is shown to be a resident taxpayer of Garfield county, and by reason of the premises hereinbefore stated he prays that respondents, and each of them, be perpetually restrained and enjoined from issuing, selling, or delivering said bonds, or any of them. The respondents interposed a demurrer to the complaint, which was by the court sustained. To this ruling of the court the appellant duly excepted, and, having elected to stand upon his complaint, judgment was entered dismissing the cause. From said judgment the appellant has appealed to this court.

Three questions may be said to be presented by the complaint, viz.: (1) Has the issuance of bonds been legally authorized by a vote of the people? (2) Is the financial condition of the county such that the proposed indebtedness may be incurred without exceeding the limitation of one and one-half per cent. of the taxable value of the property in the county which may be done without a vote of the people? (3) Is such necessity shown to exist as brings this case within the rule of *Farquharson v. Yeargin*, recently decided by this court and reported in 24 Wash. 549 (64 Pac. 717)? We think it is unnecessary, for the determination of this case, to discuss more than the first question above stated, viz.: has the indebtedness been legally authorized by a vote of the people of Garfield county? Section 6, art. 8, of the constitution of Washington, provides as follows:

“No county . . . shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, . . . without the assent of three-fifths of the voters therein voting at an election to be held for that purpose.”

By an act of the legislature, as found in § 1846, Bal. Code, counties are authorized to create indebtedness within the limitations prescribed by the above constitutional provision. The phraseology of the statute is somewhat different from that of the constitution; but, as the statute was enacted in pursuance of the constitution, it must be held to mean the same as the constitution. The question to be decided here is, does the above constitutional provision contemplate that three-fifths of all the voters voting at an election shall assent to the proposition to incur an indebtedness, or does the assent of three-fifths of those voting upon the proposition determine that it has been carried? In *Metcalfe v. Seattle*, 1 Wash. 297 (25 Pac. 1010), it was held by this court that the three-fifths majority required to carry an election in favor of increasing municipal indebtedness is three-fifths of those persons who actually vote at the election, and not three-fifths of all those who may have the right to vote thereat. The election in that case was a special one, and no other questions were submitted to the voters. In the case at bar the proposition was submitted at a general election, and counsel for appellant urges that this case should be distinguished from the former case, for the reason that at a special election the number of voters is determined by the whole number of votes cast for and against the only proposition submitted, while at a general election the number must be determined by the highest aggregate number of votes cast for candidates or propositions voted upon at such election. He therefore reasons that, since the result of this election shows that three-fifths of those who voted for presidential electors did not by their votes assent to the bonding proposition, it follows that the proposition failed to carry. As a direct response to counsel's argument, we quote from the opinion in *Metcalfe v. Seattle*, *supra*, pages 301, 302, as follows:

July, 1901.] Opinion of the Court—HADLEY, J.

. “In every other instance, we believe, where the constitution prescribes the majority required to carry a particular proposition submitted to the electors, it is a majority of those who vote upon that proposition. See art. 8, § 3, authorizing the state to contract debts; art. 11, § 2, of the removal of county seats; art. 11, § 10, of the adoption of charters by cities; art. 14, §§ 1, 2, of the location of the seat of government; art. 23, § 1, of amendments to the constitution, and § 2, of the calling of constitutional conventions. Against this it may be said that, in each of the instances mentioned, the majority required is only a majority of those voting on the question submitted; but when we observe that in all these cases the questions are to be submitted at general elections, where the whole number of votes cast may far exceed those cast for and against the particular proposition, the general policy of the constitution becomes clear in no case to require an absolute majority of all those who vote at a general election to carry a special proposition, but only a majority of those who see fit to express themselves upon the proposition; and this policy being so, why, in this case of municipal indebtedness, should we, without any special or apparent reason, argue plain words out of their ordinary meaning, and conclude that a departure was intended from the otherwise steady policy of the constitution simply because precisely the same form of words is not used?”

An examination of each section of the constitution mentioned in the foregoing extract discloses, as is there stated, that in each instance, with possibly one exception, the majority required is specifically stated as a majority of those who vote upon a proposition. The exception may be said to be found in § 2, art. 23. The language of that section differs from that of the other sections, and is susceptible of another construction. But the language of the remaining sections named is so plain that it is not even open to any other construction. While it is true that the court in that case actually decided questions arising out of a special election only, yet the reasoning of the court as set

forth above is full and comprehensive in its analysis of the meaning of the constitution as applied to both special and general elections. The question decided related to a special election; but as an inducement to that decision the general policy of the constitution is discussed, and is declared to be the same in its application to both special and general elections. This interpretation of the constitution was announced early in the history of the state, and it is not improbable that municipalities in the state may have relied upon what was then said, and that obligations involving both them and individuals may have been created on the faith thereof. The possibility of such conditions existing would furnish a strong reason for following the reasoning of that case here, even though we might not now think it grounded upon soundest principles. We are satisfied, however, with the reasoning there used, and adopt it here, and make it decisive of the question now before us.

Since we entertain this view of the case it will serve no good purpose to extend this opinion by a discussion of the authorities cited by counsel upon either side. More than three-fifths of those who saw proper to exercise their right to vote upon the proposition assented to the incurring of the indebtedness. If other voters, who had the opportunity to exercise the power of the ballot, declined to do so, they cannot now complain upon any principle of right or justice. Voters should be sufficiently interested in the public welfare to go to the polls at the time of an election and vote upon the propositions submitted. If they fail to do so, then, under our interpretation of the constitution, those who actually do the voting upon propositions submitted must determine them.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT and WHITE, JJ., concur.

July, 1901.] Opinion of the Court—HADLEY, J.

[No. 3836. Decided July 23, 1901.]

D. A. MURPHY, *Respondent*, v. J. D. CLARKSON *et ux.*,
Appellants.

ACTION AGAINST UNDISCLOSED PRINCIPAL—NON-SUIT.

In an action against an undisclosed principal upon a contract for the sale of land, plaintiff should be non-suited, where the evidence shows the contract was executed in the name of an alleged agent, as if the latter were the owner; that the contract in nowise disclosed the relation of principal and agent; that nothing was shown indicating that plaintiff believed he was dealing with an agent, nor tending to show a mutual mistake in so drawing the contract, nor a ratification by the principals, with full knowledge of the material facts respecting the unauthorized acts of the alleged agent.

Appeal from Superior Court, King County.—Hon. GEORGE E. MORRIS, Judge *pro tem*. Reversed.

Wilmon Tucker and *Ivan L. Hyland*, for appellants.

Fred H. Peterson and *Goodwin Speed*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by respondent, Murphy, against the appellants, Clarksons, who are husband and wife. On May 15, 1897, appellants resided in the state of Missouri, and were the owners of certain real estate situated in Walla Walla Addition to the city of Seattle. On said date they executed a power of attorney, wherein they appointed one F. L. Fehren, of Seattle, as their attorney in fact, and authorized him “to contract for the sale of, or grant, bargain, sell, convey, and confirm, all those certain lots, pieces, or parcels of land situated, lying, and being in King county, state of Washington, bounded and described as follows: ‘lots . . . 11 and 12, block 13 . . . all in Walla Walla Addition to the

city of Seattle,' and for us and in our names and as our act and deed to sign, sell, execute, acknowledge and deliver contracts for a deed or deeds to the above lots or parts of lots." The power of attorney describes many lots, but those named above are all that need be mentioned here. On or about the 4th day of April, 1899, a written agreement was entered into, signed by respondent, Murphy, and by Fehren-Marvin Company, by Charles E. Marvin. The terms of said agreement were to the effect that Murphy agreed to purchase the lots above described at the price of \$525. Fifty dollars in cash was paid by Murphy at the time the agreement was executed, and it was agreed that \$50 more should be paid on or before thirty days from that date, and thereafter payments were to be made in installments of \$50 or more at a time, and the whole of the purchase price was to be paid within one year from date. It was further agreed that, if Murphy should require an extension of time, the time should be extended to a limit of one-half to be paid within the first year, and one-half on or before two years. The complaint alleges that through inadvertence and mistake the said contract was executed on behalf of appellants, Clarkson and wife, in the name of Fehren-Marvin Company, whereof the said Fehren was then an officer, but that Murphy paid \$50, and that the contract so executed and the money so paid were immediately sent to the Clarksons in Missouri, who retained both the money and the contract, and ratified the contract. It is also alleged that Fehren, as agent for the Clarksons, extended the time of payment of \$50 for a period of sixty days after May 4, 1899, of which the Clarksons had actual notice, and that on June 6, 1899, Murphy tendered the Clarksons the sum of \$50, which was refused. It is further alleged that appellants refused to recognize said contract, or to abide thereby, and that they

July, 1901.] Opinion of the Court—HADLEY, J.

notified respondent that they would not carry out its terms; that thereupon respondent demanded of them the return of the said \$50, which was refused; that respondent has in every particular carried out the said contract, and is ready and willing to carry out his part thereof, but that appellants still refuse to do so; that said lots are of the value of \$750, and respondent, by reason of appellants' refusal to carry out the terms of said contract, has been damaged in the sum of \$225, as a loss arising out of his bargain to purchase said lots, and in the further sum of \$50 wrongfully detained by appellants. He prays for judgment in the sum of \$275. The answer denies the material allegations of the complaint, and alleges affirmatively that appellants executed the power of attorney heretofore mentioned constituting F. L. Fehren their attorney in fact, which continued in force until May 24, 1899, when it was revoked; that said Fehren-Marvin Company were never the agents of appellants, and never had any right or authority of any kind whereby they might or could execute or deliver any paper writing, or in any manner whatsoever bind or represent appellants with relation to any property belonging to appellants; that, notwithstanding these facts, said Fehren-Marvin Company, through Charles Marvin, one of its officers and agents, entered into the agreement heretofore described; that the appellants have at all times mentioned been, and now are, the owners of the property described in said contract, and they have never at any time ratified, approved, confirmed, or consented to the execution of said agreement; that they never at any time received any money consideration or other thing of value on account of said agreement; that said agreement was executed and delivered by and through the said Fehren-Marvin Company, with the intention of cheating appellants, and of incumbering the legal title to the property

therein described, and at that time standing in the name of appellants. A trial was had before a jury, and a verdict was returned in favor of respondent for the sum of \$75. Appellants moved for a new trial, which was, by the court, denied, and thereupon judgment was entered in favor of respondent for the sum of \$75 and costs against J. D. Clarkson and against the marital community consisting of J. D. Clarkson and his wife, Ida Clarkson. From said judgment the Clarksons have appealed.

There are many assignments of error, but we do not think it will serve any good purpose to discuss them all. The verdict returned in this case being for such a small amount, we should hesitate to interfere with it were it not that an important principle seems to be involved. The complaint and proof show that the lots belonged to Clarkson and wife. They had made Fehren their agent by power of attorney. The contract for sale was not made by Fehren, but by Fehren-Marvin Company. The latter were never authorized by the Clarksons to contract for the sale of the lands. The contract itself was not even drawn or signed by Fehren, but by Marvin, another member of Fehren-Marvin Company. The Clarksons are nowhere mentioned in the contract. It is drawn as though Fehren-Marvin Company were the owners of the land. The relation of principal and agent is nowhere disclosed in the instrument. It is alleged that through mistake it was so drawn. It is not alleged that the mistake was mutual, nor does the evidence show such to have been the fact. We are unable to find from the evidence that Murphy knew or believed that he was dealing with an agent. It does not satisfactorily appear that he knew at that time that the Clarksons were the owners of the land. Fehren testified that he authorized the substance of the contract as it was drawn, but that it was drawn as the contract of Fehren-Marvin Com-

July, 1901.] Opinion of the Court—HADLEY, J.

pany through mistake. Murphy, however, does not appear to have been in possession of the facts which constituted the alleged mistake. He must have dealt with Fehren-Marvin Company believing them to be the owners of the land and able to give the title which they guaranteed in the contract. It is not shown that he was fraudulently misled, or that he could not, by the exercise of reasonable diligence, have discovered the facts. He now attempts to show by parol proof that he was in fact dealing with the Clarksons through Fehren-Marvin Company as sub-agents of Fehren. All this is foreign to anything appearing upon the face of the written contract. Clearly, we think, his remedy is against the party with whom he contracted as shown by the face of the writing. Their liability arises under the rule announced in *Shuey v. Adair*, 18 Wash. 188 (51 Pac. 388, 39 L. R. A. 473, 63 Am. St. Rep. 879), where it is held that an agent who executes a promissory note in his own name, with nothing on the face of the instrument disclosing his agency, cannot introduce parol evidence to exonerate himself from liability on the ground that the note was executed in behalf of his principal, and that the payee was aware of the relation of the parties, and of the intent with which the instrument was executed; that, in an action by the holder against the maker of a promissory note, the latter cannot, on the ground that he executed the note as an agent, require the principals to be made party defendants, since the holder cannot be forced to sue any other parties than those disclosed by the instrument itself. Fehren-Marvin Company were in no sense the agents of the Clarksons. Their act was, therefore, without authority from them. If it be conceded that the contract made by one not an agent for any purpose was one the Clarksons could have ratified, the respondent introduced no evidence whatever to show that Mrs. Clark-

son, one of the owners of the land, even had any knowledge of its existence, or by any act whatever assented to it. There is conflict in the evidence as to what became of the \$50 paid by Murphy to the Fehren-Marvin Company, but there is no evidence whatever to show that Mrs. Clarkson ever received any portion of the money, or that she knew that it was ever paid by any one or to any one. In *O'Shea v. Rice*, 49 Neb. 893 (69 N. W. 308, 310), the court says:

"It is elementary law that knowledge by the principal of the material facts is an essential element of an effective ratification of the unauthorized acts of his agent."

For these reasons we think the court erred in not granting appellants' motion for a non-suit. The judgment is therefore reversed and remanded, with instructions to the lower court to enter judgment of non-suit.

ANDERS, FULLERTON and MOUNT, JJ., concur.

25	590
34	298

[No. 3828. Decided July 27, 1901.]

JACOB FURTH, *as Administrator, Appellant*, v. CHARLES F. KRAFT *et ux.*, *Respondents*.

APPEAL—WEIGHT OF EVIDENCE.

Where the evidence is conflicting, the findings of the trial court will not be disturbed, unless clearly against the weight of the evidence.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Preston, Carr & Gilman, for appellant.

W. D. Lambuth (*Benson & Aust*, of counsel), for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an action of unlawful detainer, for the possession of premises described, and for rent alleged to be due. The complaint, after formal allegations, alleges, in substance, that on May 1, 1894, by an oral agreement, Henry L. Yesler leased to defendants certain described property, from month to month, for an indefinite period, at a monthly rental of \$2.50; that the defendants thereupon entered into and have held possession thereof to the present time, and that no rent has been paid excepting \$10. Then follows the notice to quit or pay rent served upon defendants, and the allegations of service, and failure to pay or deliver possession. Defendants by their answer deny the allegations concerning the lease and the agreement to pay rent, admit possession and refusal to vacate and pay rent, and deny that possession was obtained from said Yesler. The cause came on for trial before the judge of the superior court of King county, a jury being waived. After hearing the evidence, the court made findings against the plaintiff, and dismissed the action. From a judgment of dismissal, plaintiff appeals.

The only question presented in this record is one of fact. There were two witnesses who testified upon the merits in the case,—one for the plaintiff, and the other for defendants. J. D. Lowman, the witness for plaintiff, testified, in substance, that on or about the 1st day of May, 1894, “Captain Kraft was owing us considerable rent for occupying a house in what is now Yesler’s Third Addition at the end of Yesler avenue car line, or near the end of it, and also several lots out in the water used for swimming, and scows and frames and toboggan slides and different things that were arranged for swimming, and a considerable rent had accumulated, and, he being unable to pay it, he tendered us the scows in payment of the back rent, and we

took them and canceled between two and three hundred dollars' worth of back rent, he agreeing to give up the house and move out to the scows, and the rent was then to be reduced to \$2.50 per month, of which he paid four months,—paid for May and June, sometime in June, \$5; some time in August he paid another \$5; and that \$10 is all we have ever collected;" that he gave up the house, and moved down on to the scows, and has been in possession ever since. Mr. Kraft, for himself, testified, in substance, that he rented a two-story house from Henry L. Yesler, but did not rent any property on Lake Washington below high water mark; never agreed to pay rent for any land on the shore of Lake Washington below high water mark; that in May, 1894, he settled with Mr. Lowman for back rent of the house he had occupied by giving two floats; that at this time he was living in his own house, built on piles in Lake Washington, where he now lives; that after making this agreement he agreed with Mr. Lowman to rent the two scows at \$2.50 per month; that he never agreed to pay rent for the water lots. A receipt for \$5 was introduced, which tended to corroborate Kraft by reason of the recital that it was for "rent for June for use of floats." It is readily seen that the evidence is directly contradictory. The trial court, having seen and heard the witnesses, was better qualified than we are to determine the facts. This court has many times decided that the findings of the trial court will not be disturbed where the evidence is conflicting, unless the weight of the evidence is clearly against the findings. *Washington Dredging, etc., Co. v. Partridge*, 19 Wash. 62 (52 Pac. 523); *Riddell v. Brown, ante*, p. 514.

The judgment will therefore be affirmed.

REAVIS, C. J., and FULLERTON, ANDERS and HADLEY, JJ., concur.

July, 1901.] Opinion of the Court—HADLEY, J.

[No. 3865. Decided July 27, 1901.]

25	593
34	22
34	93

HEBER N. TILDEN, *Respondent*, v. GORDON & COMPANY,
Appellant.

NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

Where the verdict of a jury in an action to recover the purchase price on a sale of goods is against defendant in such a sum as not to conform to the facts under either the plaintiff's or the defendant's theory of the case, the defendant is entitled to a new trial on motion therefor.

Appeal from Superior Court, King County.—Hon. W. T. SCOTT, Special Judge. Reversed.

Byers & Byers, for appellant.

The opinion of the court was delivered by

HADLEY, J.—Heber N. Tilden, doing business under the firm name and style of H. N. Tilden & Co., in San Francisco, brought this suit against Gordon & Company, a corporation, located and doing business in the city of Seattle. The plaintiff, respondent here, claims in the complaint that on the 8th day of July, 1899, he sold and delivered to the defendant, at the city of San Francisco, two hundred sacks of potatoes, weighing 22,905 pounds, and that defendant agreed to pay plaintiff therefor the sum of \$1.70 per hundred pounds, or the total sum of \$389.39; that, at the request of the defendant, the potatoes were delivered to the Pacific Coast Steamship Company at the wharf in San Francisco, consigned to the defendant at Seattle. It is alleged that the potatoes were sold upon the verbal order of one Fishel, who was the agent of defendant, that the whole sum is due and unpaid, and judgment is demanded for said sum. Under a second cause of action it is alleged that, prior to the time above mentioned, the

plaintiff sold certain other goods to defendant at the agreed price of \$365.42, upon which defendant has paid the sum of \$323.17, leaving a balance of \$42.25 due plaintiff on account thereof, and judgment is also demanded for the last named sum. The answer denies the material allegations of the complaint, and alleges affirmatively that the defendant ordered from one Caldwell, in Seattle, who purported to represent one Fishel, in San Francisco, two hundred sacks of fancy Burbank potatoes, upon condition that said potatoes should be strictly first class fancy stock; that, upon the arrival of said potatoes in Seattle, they were found upon examination to be inferior and unsalable stock, the top and bottom of each sack being filled with a fair quality of goods, but the middle of each sack was filled with little, inferior, and unmerchantable potatoes; that, upon examination and discovery of the defect in the goods, the defendant immediately notified said Caldwell that the potatoes were rejected, and were held subject to his order; that upon the day following the defendant received a telegram from plaintiff, stating that Fishel had acted as the broker of defendant, and that they refused to allow the rejection. It is further alleged that, by reason of the fact that the potatoes were decaying rapidly, it was agreed between plaintiff and defendant that they should be sold at the best price obtainable in the market. The potatoes were accordingly sold by defendant, and the proceeds of the sale amounted to \$144.55. It is alleged that, prior to the commencement of this action, the defendant tendered said sum to plaintiff, which was refused, and that defendant has at all times since been, and is now, willing and ready to pay plaintiff said sum of \$144.55, and now pays the same into the registry of the court for the use of plaintiff. The reply admits that plaintiff was notified that the potatoes were decaying, but denies every other material allegation of the

July, 1901.] Opinion of the Court—HADLEY, J.

affirmative answer. A trial was had before a jury, and a verdict was returned in favor of plaintiff for the sum of \$208. Thereafter the plaintiff moved the court for judgment upon the verdict of the jury for the sum of \$431.64, being the full amount demanded by plaintiff under both causes of action stated in his complaint. The defendant moved the court to set aside the verdict rendered, and to grant a new trial. Among the grounds set forth in the motion for new trial are (1) error in the assessment of the amount of recovery, in that the same is too large; (2) insufficiency of the evidence to justify the verdict rendered, and that it is against the law. The motions of both plaintiff and defendant were by the court denied, and judgment was thereupon entered in favor of plaintiff for the sum of \$208, the amount returned by the verdict of the jury. From said judgment, the defendant has appealed.

Both appellant and respondent seem to agree in this case that the verdict and judgment were erroneous. The respondent has not appealed from the judgment, but he has filed no brief, and has made no appearance in this court. From respondent's motion for judgment in the record we infer that it is evidently his theory that, if he is entitled to judgment at all, he is entitled, under the pleadings, to the full amount claimed in the complaint. This, we think, must be true, at least with reference to the amount claimed in the first cause of action. The complaint alleges a sale at an agreed price of \$389.39, and that the whole amount is due and unpaid. Under the complaint there is no question of value involved, and, if respondent recovers, he must recover upon the express contract alleged, and not for reasonable worth and value. Appellant denies that there was any contract with respondent, and alleges that the potatoes were bought through Caldwell, as the representative of Fishel, in San Francisco. Under the issue tendered by

the answer, respondent was a stranger to the sale, and in no way connected therewith. The answer discloses that appellant subsequently learned that Fishel had bought the potatoes of respondent, and that respondent claimed that Fishel acted as appellant's broker or agent, and, as such, made the contract set out in the complaint. It also avers that by agreement with respondent the potatoes were sold by appellant, in order to save them from decay, and that appellant holds the proceeds for respondent, which he refuses to accept; but there is no counterclaim set up in the answer, and appellant simply asks to be dismissed, with its costs and disbursements. The contract alleged being an express one as to price for the potatoes, and it being shown by the evidence that they were promptly delivered to appellant, since there is no plea of payment, counterclaim, or set-off, and no claim or pretense that any payment has been made, it follows that, if respondent is entitled to recover at all, he is entitled to the full amount claimed under the first cause of action. We are not able to account for the amount of the verdict under any theory presented by the pleadings or proofs. If the jury intended to treat the amount for which the potatoes were sold as a payment to be applied upon the purchase price, they were not authorized to do so under the pleadings. In any event, even if the jury so calculated in reaching their verdict, after deducting the sum of \$144.55, the amount for which the potatoes were sold, from the alleged contract price, \$389.39, there remains \$245.84; whereas the verdict was for \$208. If the amount claimed under the second cause of action be also considered under that theory, we are still unable to account for the amount of the verdict. We think, therefore, that, under any view, the verdict was erroneous. In view of the verdict that was rendered, and after an examination of the evidence, we believe the court did right in

July, 1901.] Opinion of the Court—MOUNT, J.

denying respondent's motion for judgment for the full amount claimed, but we think it was error to deny appellant's motion to set aside the verdict and grant a new trial.

Since the judgment must be reversed for reasons already stated, it is not necessary to discuss other errors assigned on the introduction of evidence and the instructions of the court. The judgment is reversed, and the cause remanded, with instructions to the court below to set aside the verdict and grant the motion for a new trial.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT and WHITE, JJ., concur.

[No. 3907. Decided July 27, 1901.]

SARAH F. OATES, *Respondent*, v. H. O. SHUEY, *as Receiver, et al., Appellants*.

25	597
32	500

MORTGAGE FORECLOSURES—TRIAL OF TITLE—DECREE FINDING TITLE IN HUSBAND—CONCLUSIVENESS AS TO WIFE'S INTEREST.

Under the rule that questions of paramount title cannot be tried in suits for foreclosure of mortgages; a wife is not bound by a decree in a foreclosure proceeding which finds that her husband was the sole and separate owner of the property and that she had no interest therein, even though she was made a party to the suit because of having joined in the execution of the note, was personally served, and made defendant therein.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Clise & King, for appellants.

Greene & Griffiths, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The record in this case discloses about the following facts: That one Robert C. Oates and Sarah F.

Oates, who were husband and wife, on December 15, 1892, made and delivered their promissory note for \$355 to the Seattle Savings Bank of Seattle; that on the same day said R. C. Oates, in order to secure the payment of said note, executed and delivered a mortgage on lots 7 and 8 in block 37, Mercer's Second Addition to North Seattle, to the said bank. The property at said time stood of record in the name of, and was the separate property of his wife, Sarah F. Oates, who at said time and for a long time afterwards had no knowledge of the said mortgage. This mortgage was some four years later recorded in the proper records of King county. On or about March 22, 1900, H. O. Shuey, receiver of said bank, brought an action to foreclose said mortgage, making said Robert C. Oates and Sarah F. Oates and others who had acquired interests in said property subsequent to said mortgage, parties defendant. In the complaint in the foreclosure proceeding it was alleged that Robert C. Oates was at all times the sole and separate owner of said property, and that Sarah F. Oates had no interest therein. Personal service was had on all of said defendants, none of whom appeared in the action but made default therein. Subsequently a decree was entered foreclosing said mortgage, and the property was sold thereunder, and sale confirmed. Sarah F. Oates has been in possession of said property at all times since said mortgage was made, and still has possession of the same. She now brings this action to vacate and set aside said judgment and decree so far as it affects her interest in said property. This case was presented to the lower court, and also to this court by both appellants and respondent upon the theory that the petition is a complaint to remove cloud from title, and will be so treated by this court although we have grave doubts as to the form and sufficiency of the petition for the purpose named. But this question has not

July, 1901.] Opinion of the Court—MOUNT, J.

been raised either in the lower court or in this court, and we shall, for that reason, pass it by. Upon the trial the lower court found the facts substantially as above set out, and entered a decree quieting title in Sarah F. Oates. From that decree an appeal is prosecuted in this court.

Two questions are presented upon the appeal, as follows: (1) Could the court in the foreclosure proceedings try the question of title? and (2) Was Sarah F. Oates, having been made a party, and personally served, and having made default therein, bound by the findings and decree that her husband, Robert C. Oates, was the sole and separate owner, and that she had no interest in said property? This court, in *California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co.*, 12 Wash. 138 (40 Pac. 732), held that a claim of prior and paramount adverse title could not be litigated in a foreclosure suit. It was alleged in the complaint in foreclosure, "that at all times herein mentioned the said above described property was the sole and separate property of said defendant Robert C. Oates," and "that defendant Sarah F. Oates has no interest in or to said described premises." These allegations were for the sole purpose of determining that Robert C. Oates was the owner at the time the mortgage was given, and that Sarah F. Oates at said time had no interest in the property. They could have no other office. Under the authority of *California Co. v. Cheney Co.*, *supra*, Sarah F. Oates was not a proper party to appear to litigate that question, because she could not be required to plead her paramount title in a foreclosure suit. Not being a proper party for that purpose, and not being required to appear and set up her paramount title, it was in excess of jurisdiction for the court to determine the question of title upon her default. Mr. Wiltsie, in his work on Mortgage Foreclosure, at § 191, says:

“Persons who own an interest in mortgaged premises paramount to the mortgage, are neither necessary nor proper parties to its foreclosure, for the reason that they did not acquire their rights under the mortgagor or the mortgagee, subsequent to the execution of the mortgage. Whether they are made parties or not, the decree in the action will not in any way affect their rights. Thus a widow, who did not sign a mortgage executed by her husband, should not be made a defendant to its foreclosure; and even if she is made a defendant, her rights will not be affected in any way by the decree. This is specially true if the complaint does not contain allegations setting forth her real rights in the property and asking to have them foreclosed; and even with such allegations in the complaint, it was held in one case that the judgment passing upon her rights and foreclosing them was erroneous and void.”

See, also, Jones, Mortgages, §§ 1439, 1440, 1445, and authorities there cited.

Appellants argue that because Sarah F. Oates signed the note for which the mortgage was given, and because she was the wife of the mortgagor in possession, she was a proper party for these reasons. This contention is no doubt correct, but it is only for these reasons, and for the purposes named, that she is a proper party. Where, under a statute like ours, a deficiency judgment may be had against the makers after the mortgaged property is exhausted, and where such judgment is demanded in the complaint, then she is a proper party for those purposes only. As was said in *Bradley v. Parkhurst*, 20 Kan. 462, 467:

“An action on a note and mortgage involves two things—first, an inquiry as to the amount due on the note; and in that, it is personal; and second, a proceeding to charge the real estate mortgaged with the payment of the amount found due; and in that respect it is in the nature of a proceeding *in rem*.”

See, also, Jones, Mortgages, § 1431.

July, 1901.] Opinion of the Court—MOUNT, J.

As to the first, she is a proper party for the purpose of responding to a personal judgment. As to the second, she is a proper party only for the purpose of protecting her interests *where her title is subsequent and subordinate to the mortgage*. The court, having acquired jurisdiction for these purposes, could not go beyond that, and determine other questions which are not properly in the case for litigation. 2 Jones, Mortgages, §§ 1439, 1445.

When she failed to appear, she thereby, in effect, confessed that she was liable on the note personally, and that the separate interest of her husband in the property was subject to its payment, but she was not bound to appear in the cause, and litigate her paramount claim thereto. It is true, she might have appeared in the action, and voluntarily submitted the question of her paramount title for determination, and would, in that event, have been bound by the decision thereon; but, not having appeared, the court could adjudicate only those questions properly before it for determination, and she would be bound by the decree in so far as the court had jurisdiction to make it, and no further. The question whether the mortgagor or some other person owned the mortgaged premises at the time the mortgage was given was not, as we have seen, proper to be determined in foreclosure.

We conclude, therefore, that Sarah F. Oates was not bound by the decree in so far as it determined that she was not the owner of the property, even though she was a proper party to the suit for other purposes. The judgment will be affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, HADLEY and WHITE, JJ., concur.

25	602
28	873
25	602
34	581

[No. 3929. Decided July 27, 1901.]

CHARLES NELSON, *Appellant*, v. SEATTLE TRACTION COMPANY, *Respondent*.

JUDGES PRO TEMPORE—JURISDICTION IN TRIAL OF CAUSES—POWER TO DETERMINE MOTION FOR NEW TRIAL.

Under Bal. Code, § 4676, which provides that a case may be tried by a judge *pro tempore* when the parties to the cause have agreed thereto in writing, a judge *pro tempore* may be appointed upon the written stipulation of the parties to hear and determine whatever remains to be done in a case, even after verdict, such as the determination of questions raised by motion for new trial, and the entry of judgment upon the verdict theretofore rendered.

SAME—WHEN AUTHORIZED TO SETTLE STATEMENT OF FACTS.

A judge *pro tempore* has power to settle the statement of facts in a case, where he was the presiding judge at the time of its trial and has been duly appointed judge *pro tempore* after the expiration of his term, for the purpose of trying whatever remains to be done in the case.

APPEAL—REVIEW OF MOTION FOR NEW TRIAL—INSUFFICIENT RECORD.

Alleged error of the trial court in overruling a motion for a new trial will not be considered on appeal, where there is no statement of facts in the record.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge *pro tem*. Affirmed.

W. F. Hays, for appellant.

Struve, Allen, Hughes & McMicken, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This cause was tried below to a jury, and before the Hon. Orange Jacobs, then a judge of the superior court of King county. The jury returned a verdict for defendant on the 10th day of November, 1900. On the 12th day of November, 1900, plaintiffs filed a motion for a new trial. The following day the motion was argued,

July, 1901.] Opinion of the Court—HADLEY, J.

and submitted to the said Judge Jacobs. After argument and submission, the motion was taken under advisement by the court, and, by reason of the pressure of other duties, was not passed upon before the expiration of Judge Jacobs' term of office, which occurred on the 14th day of January, 1901. Thereafter, on the 17th day of January, 1901, a stipulation in writing in said cause was entered into between counsel for plaintiffs and defendant as follows:

"It is hereby agreed that Orange Jacobs, a member of the bar of the state of Washington, shall try and determine the above entitled cause, and especially the motion for new trial therein, and render judgment upon the verdict in said cause as a judge of the said court *pro tempore*."

Upon the filing of said stipulation, the Hon. Arthur E. Griffin, a judge of the said court, entered the following order:

"I hereby make and approve the appointment of Orange Jacobs as judge *pro tempore* in the above entitled cause."

On the same day Orange Jacobs executed and filed the proper oath of qualification as judge *pro tempore* in said cause, and thereafter denied plaintiffs' motion for a new trial, and entered judgment in favor of defendant to the effect that plaintiffs should take nothing by their said action and that respondent should go hence without day, and should recover its costs. From said judgment the plaintiff Charles Nelson has appealed.

The first assignment of error is that the court erred in appointing a judge *pro tempore*. We do not think so. The statute, as found in § 4676, Bal. Code, clearly authorizes such an appointment to be made when the parties to a cause have agreed thereto in writing. The statute reads: "A case . . . may be *tried* by a judge *pro tempore*" We construe the statute to mean that a judge

pro tempore acquires jurisdiction of a cause from the time of his appointment and qualification, and he thereafter *tries* what remains to be done in the case, whether it be the trial of questions of fact or of law, or both. In this case the trial upon the facts had been heard, and there remained certain questions of law to be determined, viz., those raised by the motion for a new trial and the entry of judgment.

The next assignment of error is stated as follows:

“The order approving the appointment of Orange Jacobs as judge *pro tempore* as judge in said cause is void for the reason that said judge *pro tempore* under said stipulation and under the law had no power to settle a bill of exceptions and statement of facts containing the exceptions reserved on the trial of the cause as required by law, the term of office of the judge of the court who presided at the trial of this cause having expired without the motion for new trial having been acted upon by him.”

We think, as heretofore stated, that the order was properly entered, and that the judge *pro tempore* had the power to settle the statement of facts. He was, in effect, for all purposes of the case, the successor in office of the judge who tried the case. In the case of *Rauh v. Scholl*, 19 Wash. 30 (52 Pac. 332), the motion for new trial was decided, and judgment was entered by a judge who succeeded the one who tried the cause upon the facts. The court affirmed the judgment in that case, and held that the succeeding judge was empowered both to decide the motion for new trial and enter judgment. In that case a motion was made to strike the statement of facts on the ground that it was settled by the judge after his term of office had expired. The court held that the motion would have been well taken, under the authority of *Hallam v. Tillinghast*, 19 Wash. 20 (52 Pac. 329), but for the fact that the appellants in the case also procured the certificate of the

succeeding judge. Under the authority of the last named case, it is the certificate of one vested with judicial power that gives vitality to a statement of facts. In that case, at page 23 of the opinion, the court says:

“No hardship can result, for the statement can be settled by the court. The identity of the judge is lost in the court, and the court continues, although the term of a judge is ended. Where a controversy arises the ex-judge can be subpoenaed and compelled to testify.”

In *Gunderson v. Cochrane*, 3 Wash. 476, 480 (28 Pac. 1105), it is said:

“In a proceeding to settle a statement before a succeeding judge, to assist in ascertaining the facts, the judge who tried the cause can be subpoenaed and required to testify. If a case should arise where the office was vacant, or where the statement could not be settled for any cause over which the parties had no control and could not avoid, we might grant a new trial or take some suitable action in the premises, but it is sufficient now to say that we have not such a case before us.”

No such conditions exist in this case as are suggested in the quotation last above set forth. Orange Jacobs was judge *pro tempore* in the cause, and as such was as fully empowered to continue proceedings in the case to its close in the superior court as though he had been a duly elected and qualified judge of said court at the time. There was no necessity for calling in the judge who tried the cause to testify as to what occurred at the trial, in order to enable the presiding judge to determine controversies concerning the statement of facts, for the reason that Orange Jacobs, the judge *pro tempore*, was the same individual as Judge Orange Jacobs, who formerly presided. By no kind of metaphysical reasoning can it be maintained that the knowledge possessed by Judge Jacobs when he was a superior judge was not retained by him when he became judge *pro tempore* three days later.

The next assignment of error is that the judge *pro tempore* erred in overruling appellant's motion for a new trial. There is no statement of facts in the record, and we cannot intelligently consider the motion for new trial on its merits.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, WHITE and MOUNT, JJ., concur.

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[No. 3903. Decided July 31, 1901.]

J. BURKMAN *et al.*, Respondents, v. PETER JAMIESON, Appellant.

INTOXICATING LIQUORS—INJURIES FROM SALE—LIABILITY OF LESSOR
—RIGHT OF ACTION AGAINST TENANT.

Where a lessor of premises has been compelled to pay a judgment for damages against him by reason of the injuries resulting from the sale by his tenant of intoxicating liquors on the leased premises, under Bal. Code, §§ 2945, 2947, which provide that the owner or lessor of premises wherein intoxicating liquors are kept for sale shall be severally and jointly liable with the person selling for injuries to person or property or means of support caused to another by reason thereof; and any owner or lessor of real estate, who shall pay any money on account of such liability, for any act of his tenant, may, in a civil action, recover of the tenant the moneys paid, a lessor who has been compelled to pay a judgment against himself for the act of a tenant has no right of action against his tenant, when the latter had not been made a party to the original action fixing the liability of the lessor.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Preston & Embree, for appellant.

William Parmelee, for respondents.

July, 1901.]

Opinion of the Court—MOUNT, J.

The opinion of the court was delivered by

MOUNT, J.—Under § 2945, Bal. Code, Bridget Fitzgerald and her minor child, by a guardian *ad litem*, instituted separate actions for damages in the superior court of King county against respondents and one J. D. Lowman, as lessors and owner, respectively, of certain premises where intoxicating liquors were kept for sale. Appellant, who was their tenant, and who was the proprietor of the saloon operated on said premises, was not made a party to either of said actions, had no notice of the pendency thereof, and did not appear therein. On April 20, 1900, said Bridget Fitzgerald and said minor, by its guardian *ad litem*, each recovered judgment in said action for the sum of \$525. Thereafter respondents, Burkman Brothers, paid these judgments, and brought this action against appellant to recover the amount so paid. The complaint alleges substantially that the respondents leased to the appellant a certain building in the city of Seattle, and that the appellant occupied said building as a saloon, wherein intoxicating liquors were bought and sold, and that the appellant knowingly permitted therein the sale of intoxicating liquors in the month of September, 1899; that in said month in said building appellant sold and disposed of, and caused to be sold and disposed of, intoxicating liquors to one William Weir and to one Richard Fitzgerald; and that by reason of said sales and disposal of said intoxicating liquors to said Weir and Fitzgerald the said Weir made an assault upon the said Fitzgerald, and did beat and wound him, from the effects of which, and the intoxicating liquors sold as aforesaid, the said Fitzgerald died in said saloon, and that said death would not have been caused but for and on account of the intoxicating liquors sold to him and said Weir by the appellant. It is further alleged that Bridget Fitzgerald, widow of said Richard Fitzgerald,

and Georgiana Fitzgerald, minor child of said Richard Fitzgerald, instituted in the superior court of King county their separate actions against these respondents and one J. D. Lowman, and that upon the trial of said actions judgments were rendered in each of them in favor of plaintiffs therein and against these respondents and said Lowman for the sum of \$525 on account thereof, and that respondents had paid the same. Respondents pray for judgment against appellant for the amount so alleged to have been paid by them and on account of said judgments. To this complaint a demurrer was interposed by appellant upon the ground: (1) that there was a misjoinder of parties; and (2) that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and exception taken and allowed. An answer amounting to a general denial was thereupon filed. The cause was tried to the court and a jury. In the course of the trial the judgment in *Fitzgerald v. Lowman* and others was offered and admitted in evidence, over the objection of appellant. No injury to Mrs. Fitzgerald or her minor child was alleged or shown at the trial, other than was shown by the judgments above named. At the close of the evidence for plaintiffs, appellant moved for nonsuit, which was denied. Appellant then introduced evidence tending to prove that no liquors had been sold or given to Weir or Fitzgerald, and rested. Respondents then moved the court to discharge the jury, and make findings for plaintiffs. This motion was granted, and judgment entered thereon. Appeal is taken from this judgment.

This appeal turns upon the question whether appellant is bound by the judgment in *Fitzgerald v. Lowman et al.*, to which action he was not a party, which he had not been notified to defend, and in which he had not appeared. If he was bound, under the law, by that judgment, then the

July, 1901.]

Opinion of the Court—MOUNT, J.

complaint stated a cause of action, the judgment being conclusive upon him as to all the facts necessary to sustain it. If the said judgment was not conclusive upon him, then it became necessary for respondents to allege and prove, in addition to the allegations of the complaint, that Mrs. Fitzgerald and her minor had been injured in means of support, and the amount thereof, not exceeding the judgment. It is the common law rule that all who are not parties to a judgment, nor privies to such parties, are wholly free from the estoppel of the judgment. 2 Black, Judgments, 600; 1 Freeman, Judgments, 154.

This rule prevails, unless abrogated by statute. Section 2945, Bal. Code, makes the owner or lessor of premises wherein intoxicating liquors are kept for sale severally and jointly liable with the person selling, where injury in person or property or means of support is caused to another by reason thereof. Section 2947, Bal. Code, provides as follows:

“Any owner or lessor of real estate, who shall pay any money on account of his liability incurred under this chapter, for any act of his tenant, may, in a civil action, recover of such tenant the money so paid.”

The object of these sections evidently was to make the tenant liable for the damages he causes. He is liable to the persons injured, and liable also to the landlord or lessor who has paid money for liability incurred by the act of the tenant, either in a joint or several action. The liability of the owner or lessor depends upon the liability of the tenant. If there is no liability of the tenant, there can, of necessity, be no liability of the lessor or owner. Before there can be any recovery against the lessor or owner, the liability must be established against the tenant; and a judgment against the landlord must depend upon the liability of the tenant. If the landlord does not require

the tenant to defend or give him an opportunity to do so, he must assume the burden of maintaining the liability against the tenant. This statute does not give a right of action for money paid without liability, but on account thereof. Where a person is made liable in damages for any act, he ought, in justice, to have a right to defend against a claim therefor. It is but common right that he should have his day in court, and an opportunity to plead and prove a defense if he have one. Under the rule contended for by respondents, viz., that the judgment in this case is conclusive against the appellant, this principle, which is as old as the law itself, might in many instances, be set aside. For example, it would be possible for an owner or lessor of premises, who had been severally sued on account of an act of his tenant, to compromise such action without notice to the tenant either of the suit or compromise, and thereupon in good faith have a jury called, and proof taken, and a verdict and judgment for an amount agreed upon, which judgment would be conclusive against the tenant, who might have a perfect defense. And again, the tenant may have settled a claim in full without suit, and an action for the same injury be brought against the owner without knowledge of the tenant, and judgment recovered which would be binding upon the tenant. Or again, the owner might be sued severally, and a recovery had, without notice to the tenant, for an injury which had once been defeated by the tenant in an action against him, and against which he had a perfect defense. If the judgment against the owner is binding upon the tenant, he could not be heard to defend against it in a suit by the owner to recover from him. These conditions and others would be possible under the construction urged by respondents. It was evidently not the intention of the legislature to deprive a tenant of his right or opportunity to

July, 1901.]

Opinion of the Court—MOUNT, J.

make a defense to a claim for liability, and no fair construction of the language of the section quoted can make it do so. We think the owner or lessor under our statute stands in the nature and relation of an indemnitor or surety for the tenant severally liable with him, and that, when an action is brought against him, he may make his tenant a party by giving him a "full, fair, and previous opportunity to meet the controversy," and thus avoid the peril and inconvenience of being required in a subsequent controversy to show the liability of the tenant in order to recover back the amount paid out.

A question similar to the one here under consideration was decided by the supreme court of Ohio in the case of *Goodman v. Hailes*, reported in 59 Ohio St. 342, also reported in 52 N. E. 829, and the court held in that case that the judgment was conclusive. The supreme court of Iowa, in the case of *Buckham v. Grape*, 65 Iowa, 535, reported in 17 N. W. 755, and on rehearing in 22 N. W. 664, arrived at the opposite conclusion. These cases, while involving much the same question, turned principally upon statutes of the respective states, and are of little value in the determination of the question here.

Under the view we have taken of the case, it follows that the complaint did not state a cause of action, and that the demurrer should have been sustained. Other errors are complained of, but we think the rulings of the trial court were correct, and a review of them here would avail nothing.

The judgment will be reversed, and the cause remanded, with instructions to the lower court to sustain the demurrer to the complaint, with leave to respondents to amend.

REAVIS, C. J., and FULLERTON, ANDERS, HADLEY and WHITE, JJ., concur.

[No. 8984. Decided August 5, 1901.]

*In the Matter of the Application of EBEN L. BOYCE for
Writ of Habeas Corpus.*

STATUTES—TIME OF TAKING EFFECT—DEATH WARRANT—REPEAL OF
AMENDATORY CLAUSE.

The act of March 8, 1901 (Laws of 1901, p. 100) relating to the death warrant and amending §§ 6993, 6995, Bal. Code, relative thereto, not being effective under the constitution (art. 2, § 31) until ninety days after the adjournment of the legislature which enacted it, which would make the date of its going into effect June 12, 1901, never became operative by reason of the passage and approval by the legislature in extraordinary session on June 12, 1901, of the act repealing said amendatory act, with an emergency clause declaring the repeal immediately effective, since a statute which takes effect from and after its passage goes into operation on the day when approved and relates back to the first moment of that day.

Original Application for Habeas Corpus.

*John F. Dore, J. J. McCafferty, G. W. H. Davis and
James F. O'Brien, for petitioner.*

PER CURIAM.—The petitioner was tried, convicted, and sentenced for the crime of murder in the first degree, and sentenced to be hanged on the 9th day of August, 1901. The death warrant was issued at 10:30 a. m. on the 12th of June, in conformity with § 6993, Ballinger's Code. It is maintained by counsel for petitioner that when the death warrant was issued the act approved March 8, 1901, was in force and effect, and that such act repealed § 6993 of Ballinger's Code, and that there was no authority for the execution of the defendant by the sheriff of Pierce county. The legislature adjourned *sine die* on the 14th day of March, 1901. The constitution provides (§ 31, art. 2), "No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which

Aug. 1901.]

Opinion Per Curiam.

it was enacted, unless in case of an emergency”

The rule of computation of time urged by counsel is, that ninety days after the adjournment of the session made the act of March 8, 1901, in effect the 12th day of June. But on the 12th day of June, 1901, the legislature in extraordinary session passed an act repealing the act of March 8, 1901, entitled an act relating to the death warrant, the contents thereof, the return of same, and fixing place of execution, and amending §§ 6993 and 6995 of Ballinger's Annotated Codes and Statutes of Washington; and in § 2 declared the following emergency clause: “For the purpose of preventing the act hereby repealed from ever becoming operative for any purpose, an emergency is hereby declared to exist and this act shall take effect immediately.”

The general rule is, as to legislative acts, or public laws, or such judicial proceedings as are matters of record, that the law allows no division of a day, and that a statute which takes effect from and after its passage goes into operation on the day which it is approved, and has relation to the first moment of that day. The legislative day on the 12th of June commenced on the first moment of that day. If the correctness of the computation of counsel be conceded the repealing act of June 12, 1901 (Laws 1901 [Ex. Sess.], p. 3), which was specially declared to prevent the going into effect and operation of the law of March 8, 1901, relating to the execution of the death warrant, made the last repeal effective before the act went into effect. It was observed in the *Matter of Welman*, 20 Vt. 653:

“This rule does not apply in all cases, but, like most other general rules, is subject, in its application, to just and reasonable exceptions. It does not prevail in questions concerning merely the acts of parties, where it becomes necessary to distinguish and ascertain which of several persons has a priority of right; But

though divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts, or public laws, or such judicial proceedings as are matters of record."

The legislature may, undoubtedly, give effect at any particular time by the direct expression of its intention to make an act in effect. But in the last repealing act the legislative will is clearly expressed, and the act was to take effect immediately, and upon and including the legislative day, and every moment thereof. The fact that the time was specified when the respective bills were signed by the presiding officers does not change the general rule which has already been stated. As the hour at which the bills passed is immaterial, the effect of the law is the same whether there be any specification of the time of action upon the bill. It is concluded, therefore, that the repealing act of June 12, 1901, was effective, and that the act of March 8, 1901, commonly called the "Rands act," relating to the death warrant was never in effect, and that §§ 6993 and 6995, Ballinger's Code, were, on the 12th of June, 1901, and are now in full force and effect. The petitioner, therefore, presents no *prima facie* case for relief, and affirmatively shows he is not entitled to the writ.

The writ denied.

[No. 3133. Decided August 23, 1901.]

C. R. WILSON *et al.*, Appellants, v. CITY OF ABERDEEN *et al.*, Respondents.

APPEAL—OBJECTIONS NOT URGED BELOW—INSUFFICIENCY OF PLEADINGS.

Objection that the answer filed in an action fails to state a defense thereto cannot be raised for the first time on appeal.

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Aug. 1901.] Opinion of the Court—ANDERS, J.

SAME—PRESUMPTIONS IN FAVOR OF JUDGMENT.

A judgment denying a writ of mandate upon proofs offered and submitted by the parties will be presumed as warranted by the facts, when neither the evidence nor the findings of fact are in the record, although the affidavit for the writ may make out a *prima facie* case, to which no complete defense, either by demurrer or answer, may have been interposed.

MANDAMUS—PROCEDURE—FORMATION OF ISSUES OF FACT—DEPENDENCE ON MODE OF TRIAL.

The fact that Bal. Code, § 5760, authorizes the court to order questions of fact in an application for mandamus to be tried before a jury, would not excuse the applicant from replying or demurring to an answer therein until the cause had been assigned for trial by jury, since the same section vests the court with power, in its discretion, to hear and determine such questions without a jury.

FINDINGS OF FACT—FAILURE TO FILE—HARMLESS ERROR.

The failure of the court to file findings of fact and conclusions of law in cases tried without a jury, as required by Bal. Code, § 5029, is not ground for reversal, when no request for such findings, nor objection to the judgment for lack thereof, appears in the record.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Affirmed.

J. A. Hutcheson and Greene & Griffiths, for appellants.

J. C. Cross, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This was an application to the superior court of Chehalis county for a writ of mandate to compel the city of Aberdeen, and the mayor and council and certain other officers of said city, to collect, by suit or otherwise, the assessments which were levied upon certain premises abutting on Huron street, between Alder and Washington streets, in said city, for the purpose of paying the cost of improving the street in front of said premises. The affidavit upon which the application was based is elaborate

and circumstantial, and seems to state facts which, if established, would entitle the plaintiffs to the writ demanded, at least as against those officers whose duty it is to collect street assessments. At the time noticed for the hearing of the application, the defendants appeared, and filed written objections to the issuance of the writ, which were partly in the nature of a demurrer, and partly in the nature of an answer. That part of the objections which may be deemed a demurrer alleged (1) that the affidavit on the part of the plaintiffs failed to state facts sufficient to constitute a cause of action against the defendants; and (2) that said affidavit shows that the matters sought to be enforced by said writ have long since been barred by the statute of limitations, both as to the subject matter and as to the right to prosecute or enforce the said matter. The other matters and things set up by the defendants by way of answer would seem, for the most part, to be immaterial, as they neither deny the material allegations of the affidavit, nor allege, except by inference merely, facts constituting a defense. No objection seems to have been taken to the form or substance of the defendants' pleading, and it appears that the trial court either treated the defendants' objections as answers merely, or overruled the demurrers, or disregarded the issues of law raised thereby. These conclusions are based upon the circumstance that there is nothing in the record respecting such issues of law, and upon the statement in defendants' brief, which seems to be supported by the judgment, that testimony was taken and an issue of fact tried. The judgment of the court is as follows:

"This case coming on for hearing on plaintiffs' motion for mandamus against the defendant city, and the same being argued by counsel, and the court being fully advised in the premises, it is ordered that the said motion be and it is hereby, it appearing to the court from the proofs offered

Aug. 1901.] Opinion of the Court—ANDERS, J.

and submitted by the parties that no sufficient reason exists for such writ, it is therefore ordered and adjudged that the application of plaintiffs for a writ of mandamus herein be and the same is denied with costs to the defendants, and for such costs taxed at \$17.80 execution may issue."

From this order and judgment denying their application the plaintiffs have appealed to this court.

There is neither a statement of facts nor a bill of exceptions in the record in this proceeding, and we are therefore utterly unable to ascertain what the "proofs" were which were "offered and submitted by the parties" at the trial in the lower court. But the mere absence of the evidence from the record might, perhaps, have been of little or no consequence if the trial court had made findings of fact and conclusions of law, and the same had been embodied in the record on appeal; for if such findings and conclusions had been made, this court could at least have determined whether or not the judgment was warranted thereby. But no such findings or conclusions appear in the record, and it is not even suggested by counsel on either side that any such were made. The record consists of the affidavit for the writ, the "objections" interposed by the city and its legislative officers, and by the ministerial officers of the city, respectively, the order and judgment of the court, and the exception thereto by appellants, the notice of appeal, and the appeal bond, and nothing more.

The appellants contend that the trial court erred (1) in refusing the writ; and (2) in rendering judgment without findings of fact or conclusions of law. The first of these assignments is rather too general and comprehensive to be serviceable to this court in pointing out any particular error relied on for reversal of the judgment, and might properly be disregarded for that reason. If there were no errors in the proceedings antecedent to the judgment, it necessarily follows that it was not error to deny the writ.

It is just those errors which occur in the course of the trial, and before judgment, which both the statute and the rules of this court require the appellant to clearly set forth in his brief. This the learned counsel for appellants have done, in a measure, not by the general assignment of error above set out and considered, but by way of argument upon points made in their brief. It is claimed by counsel that the respondents' so-called objections to appellants' affidavit, whether considered as demurrers or answers, fail to state a defense to the cause of action set out in said affidavit. But if that be true,—and it must be conceded that there is some ground for the assertion,—the objection here made should have been interposed in the lower court at or before the trial. So far as the alleged demurrers are concerned, the appellants have no cause for complaint, for the ruling of the court upon them, whatever it may have been, was not favorable to the respondents. The appellants should have demurred to the alleged answers, if they considered them, as they now do, insufficient in substance; but this, it seems, they did not do, and they cannot be permitted to raise such objection for the first time in this court. Section 5761 of Bal. Code, provides that "on the trial the applicant [for a writ of mandate] is not precluded by the answer from any valid objections to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance;" and § 5775 provides that, except as otherwise provided, the provisions of the Code of Procedure concerning civil actions are applicable to, and constitute, the rules of practice in mandamus proceedings. As we have seen, it does not appear that appellants objected to the sufficiency of the answers of the respective respondents, or rather classes of respondents, by demurrer, as contemplated by the statute, but it does appear, inferentially, at least, from the judgment appealed from, that they were

Aug. 1901.] Opinion of the Court—ANDERS, J.

content to countervail the answers by proof, "either in direct denial or by way of avoidance," and that the court was satisfied "from the proofs offered and *submitted by the parties*," that no reason existed for a writ of mandate, and the application was therefore denied. Why the court concluded that no reason existed for the writ we are not advised; but, inasmuch as the evidence upon which the judgment was based is not before us, we must presume that the judgment was warranted by the facts.

It is insisted, however, that, under § 5760, Bal. Code, an applicant for a writ of mandate is not affected by, nor required to respond to, an answer or return, unless the court assigns the cause for trial by jury upon an answer which "raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based." But under that section (5760) the court is not bound to submit an issue of fact to a jury. The court may "in its discretion" order a trial of a question of fact raised by the answer before a jury, or may itself try such question. In this case the questions of fact were tried by the court, and, for aught that appears in the record, with the consent of all parties; and if the answers tendered no such issues of fact as the statute contemplates the objection, upon that ground, as we have already intimated, ought to have been interposed in the trial court, where such defects, if any existed, might have been remedied.

We come now to the consideration of the appellants' contention that the judgment must be reversed because of the failure of the trial court to make findings of fact and conclusions of law. Our statute provides that "upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the

decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." Bal. Code, § 5029; 2 Hill's Code, § 379. This provision of the Code is in form mandatory, and this court has several times held, in effect, that in actions at law tried by the court without a jury, findings of fact and conclusions of law are necessary to support the judgment. See *Bard v. Kleeb*, 1 Wash. 370 (25 Pac. 467); *Kilroy v. Mitchell*, 2 Wash. 407 (26 Pac. 865); *King County v. Hill*, 1 Wash. 404 (25 Pac. 451); *Sadler v. Niesz*, 5 Wash. 182 (31 Pac. 630, 1030); *Potwin v. Blasher*, 9 Wash. 460 (37 Pac. 712). But in more recent cases it has been decided that a judgment will not be reversed on appeal for want of findings of fact and conclusions of law, where it is not made to appear by the record that there was any request for such findings and conclusions, or any objection raised upon that account. *Washington Rock Plaster Co. v. Johnson*, 10 Wash. 445 (39 Pac. 115); *Remington v. Price*, 13 Wash. 76 (42 Pac. 527). No requests for findings, or objections to the judgment for lack of findings, appear in this record, and it therefore follows, according to the decisions last above cited, that the judgment will not be reversed on account of the misprision of the court in that regard.

It may not be improper to say, in conclusion, that we regret our inability to pass upon the real merits of this cause, for it is difficult to free our minds from the impression produced by respondents' answers that the case may have been tried and determined upon issues which this court would have deemed immaterial; but owing to the imperfect condition of the record, as we find it, we are unable to say that the judgment was wrong, and it must therefore be affirmed.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

Aug. 1901.]

Syllabus.

[No. 3713. Decided August 23, 1901.]

THE STATE OF WASHINGTON *on the Relation of W. L. Belt, Respondent, v. H. L. KENNAN, Police Justice, Appellant.*

PROHIBITION, WRIT OF—TO JUSTICE OF PEACE—OTHER ADEQUATE REMEDY.

The action of the superior court in granting a writ of prohibition to prohibit a justice of the peace from further proceeding in the prosecution of a defendant for a misdemeanor because, as viewed by the superior court, the justice was proceeding without jurisdiction and his conclusion would be void, will not be disturbed on appeal to the supreme court therefrom, when it is questionable whether the defendant would have an adequate remedy by appeal from the judgment of the justice.

TRIAL BY JURY—RIGHT TO—VIOLATION OF CITY ORDINANCES.

Violation of city ordinances do not fall within the class of misdemeanors against the state, under which the accused is guaranteed the right of trial by jury, from the mere fact that Bal. Code, § 739, subd. 36, provides for the arrest, trial and punishment of all persons charged with violating any of the ordinances of cities of the first class, "but such punishment shall in no case exceed the punishment provided by the laws of the state for misdemeanors," since Laws 1899, p. 135, specially defining the jurisdiction of the justice of the peace selected as police justice in such cities, provides that he shall have exclusive jurisdiction over all offenses defined by any ordinance of the city, and that in the trials of actions for violations thereof, "no jury shall be allowed."

SAME—CONSTITUTIONAL LAW.

The constitutional right of trial by jury is not impaired by the summary trial and punishment of a person for the violation of a city ordinance against disorderly conduct, since such constitutional guaranty does not extend to petty and minor offenses.

CITY ORDINANCE AGAINST DISTURBANCE OF PEACE—CONSTRUCTION—RIOTOUS CONDUCT.

A city ordinance prescribing the punishment of "every person who shall on any street, sidewalk, alley, or public place, or in or upon any private house, building or premises, act in a noisy, riotous or disorderly manner," merely uses the term "riotous"

in its popular meaning of wanton and bolsterous, and has no allusion to the technical crime of riot.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

T. D. Rockwell, for appellant.

Graves & Graves and *Sullivan, Nuzum & Nuzum*, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Appeal from proceeding in the superior court for a writ of prohibition. The appellant is police justice in the city of Spokane. In 1899 respondent, Belt, was charged with an offense under a city ordinance which reads as follows:

“Section 1. Every person who shall on any street, sidewalk, alley, or public place, or in or upon any private house, building or premises, act in a noisy, riotous or disorderly manner shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one dollar nor more than fifty dollars.”

He appeared in the police court, and entered a plea of not guilty, and demanded to be tried by a jury. The justice refused to call a jury, whereupon respondent made application to the superior court for a writ of prohibition. To the affidavit for the writ appellant interposed a demurrer on two grounds,—that the affidavit did not state facts sufficient to constitute a cause of action, and that appellant was not entitled to the relief sought. The court overruled the demurrer, and, appellant electing to stand thereon, a peremptory writ of prohibition was granted, from which an appeal was taken to this court.

Appellant here urges that respondent, Belt, had a plain, speedy, and adequate remedy at law, and that the writ of prohibition should not have been granted by the superior

Aug. 1901.] Opinion of the Court—REAVIS, C. J.

court. The remedy by appeal may be doubtful. This view was taken by the supreme court of the United States in *Callan v. Wilson*, 127 U. S. 540 (8 Sup. Ct. 1301). The writ was granted by the superior court to an inferior tribunal, because, as viewed by the superior court, the inferior was proceeding without jurisdiction, and its conclusion would be void; and the discretion of the court in the use of the remedy will not be disturbed here.

But it is urged upon the merits by counsel for respondent that the offense which respondent is charged with is of right triable by jury, and it is contended that powers conferred upon cities of the first class by the legislature authorize the punishment of criminal offenses as such, and that thus the constitutional right of trial by jury exists in each case denounced by such city ordinance. After enumerating the legislative powers of the municipality in subd. 36 of § 739, Bal. Code, it further provides:

“ . . . for the arrest, trial and punishment of all persons charged with violating any of the ordinances of said city; but such punishment shall in no case exceed the punishment provided by the laws of the state for misdemeanors;”

and it is argued that this is a designation of all such offenses under municipal ordinances as misdemeanors. Section 7435, Bal. Code, is cited as fixing the limit of punishment under the Criminal Code for a misdemeanor, which is by imprisonment in the county jail not more than one year, or by a fine of \$500, or by both such fine and imprisonment, and counsel demands, “Can such a punishment be inflicted by a police justice?” The question can be answered emphatically, “No.” But it cannot be assumed that the legislature intended such a result. Section 7435 is a general provision of the Penal Code relating to public crimes, particularly those against the state.

Section 4683, Bal. Code, defines the jurisdiction of justices of the peace in criminal cases as follows:

“ . . . they shall also have jurisdiction over all criminal cases coming under any city or town ordinance, and on conviction shall have power to fine the person so offending in any sum not exceeding one hundred dollars.”

But the special law applicable to the police justice is found in Session Laws 1899, p. 135, in which act two justices of the peace are provided for each incorporated city of the first class, which may include outlying territory. One of such justices of the peace shall be designated by the mayor of the city as the police justice, and § 3 provides that such justice, in addition to his powers as justice of the peace, “shall have exclusive jurisdiction over all offenses defined by any ordinance of the city, and all other actions brought to enforce or recover any license, penalty, or forfeiture declared or given by such ordinance, and full power and authority to hear and determine all causes, civil or criminal, arising under such ordinance, and to pronounce judgment in accordance therewith in the trials of actions brought for violation of any city ordinance, no jury shall be allowed.” This last and special statute, conferring jurisdiction on the justice of the peace for the city, must be controlling, especially in view of the inapplicability of the general statute relative to misdemeanors, cited by counsel. The court cannot adjudge it unconstitutional if by fair construction the intention of the legislature can be found expressed in the special statute. The reasonable conclusion seems to be that the legislature has authorized cities of the first class to, by ordinance, restrain and provide for the punishment of petty and minor offenses, and has provided a court for their cognizance.

The further inquiry then is, does such legislation im-

Aug. 1901.] Opinion of the Court—REAVIS, C. J.

pair the constitutional right of trial by jury? It would seem from an investigation of the authorities that the summary trial and punishment of such petty offenses has been the custom in England since the declaration of Magna Charta, and almost everywhere in the states throughout the Union since the adoption of constitutions similar to ours, preserving the inviolability of the right of trial by jury. Judge Dillon, *Municipal Corporations* (4th ed.), § 433, observes:

“Violations of municipal by-laws proper such as fall within the description of municipal police regulations, as for example those concerning markets, streets, water-works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends.”

Sedgwick on Statutes and Constitutional Law, pp. 548, 549, states the rule:

“Extensive and summary police powers are constantly exercised in all of the states of the Union for the repression of breaches of the peace and petty offenses, and these statutes are not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury.”

It was observed in *State v. Glenn*, 54 Md. 572:

“The framers of all our constitutions were well acquainted with the history of legislation in regard to the exercise of summary jurisdiction, both in England and in this state, and of the needs of society for summary protection against the vicious, idle, vagrant and disorderly portion of its members; and it is difficult to suppose that, by any provision incorporated in those instruments, it was intended to nullify previous legislation, altogether interdict the use of a long and well-established summary jurisdiction for the protection of society, and thus rad-

ically change and seriously impair the whole police system of the state.”

It seems to be conceded in *Callan v. Wilson*, *supra*, that there was a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury. The following authorities are pertinent and well considered: *McGear v. Woodruff*, 33 N. J. Law, 213; *People v. Justices*, 74 N. Y. 406; *Byers v. Commonwealth*, 42 Pa. St. 89.

The offense with which the respondent is charged is one peculiarly against the peace and order of the municipality, and comes within the rule announced by the courts in the sister states having constitutional declarations similar to our own. The word “riotous,” used in the ordinance, is evidently used in its popular meaning as wanton and boisterous, and has no allusion to the technical crime of riot. It will be observed in the discussion of this question and in an examination of the authorities that the courts look to the nature of the offense, rather than to its designation by name, so that but little profit is found in refining upon the definition of misdemeanors. It is the petty nature of the offense which usage has placed in the jurisdiction of municipalities, and which offenses are not usually designated in the body of the criminal law as public crimes. And, too, the punishment is made to fit the crime. It is limited, and precedents are found where courts have adjudged such ordinances void because the penalty was too severe. The reasons for such summary jurisdiction are numerous and apparent, and the custom almost universally exists, and is consistent with the fullest and completest protection of the most sacred guaranties of the constitution. The penalty affixed by the ordinance in question is less than the limit of \$100 fine

authorized by the legislature, as the jurisdiction of the justice of the peace designated as a police justice is herein construed.

The judgment is reversed, with direction to the superior court to quash the writ of prohibition.

ANDERS, DUNBAR and WHITE, JJ., concur.

[No. 3641. Decided August 27, 1901.]

WEST COAST MANUFACTURING AND INVESTMENT COMPANY, *Appellant*, v. WEST COAST IMPROVEMENT COMPANY, *Respondent*.

25	627
31	611
25	627
37	348

APPEAL—SUPERSEDEAS BOND—SUFFICIENCY.

A judgment in favor of defendant for costs upon the dismissal of plaintiff's action is a judgment for money, and a supersedeas bond upon appeal therefrom need only be in a sum double the amount of such costs, in addition to the \$200 penalty required in the appeal bond, under Bal. Code, § 6506, which provides that the penalty of an appeal bond shall not be less than \$200, and, in order to effect a stay of proceedings, where the appeal is from a final judgment for the recovery of money, it shall be in a penalty double the amount of the damages and costs recovered in such judgment.

PLEADING—BREACH OF WARRANTY OF TITLE—IMMATERIAL AVERMENTS.

In an action for the breach of a covenant of title, in a warranty deed, the action of the court in striking from the complaint, on motion of defendant, the words, "and claimed to own and held itself out as the owner of all the lands to deep water," was not erroneous, when such stricken matter referred to claims made by defendant a year prior to the execution of the deed, since the intention of the parties must be gathered from the deed itself, when there is no ambiguity in its terms.

VENDOR AND PURCHASER—WARRANTY OF TITLE—LIABILITY OF VENDOR OF STATE LANDS.

Where a grantor conveys a tract of land by metes and bounds, with full covenant of warranty of title, he is bound by his covenant as to the whole tract, although a portion of it was openly, plainly, visibly and notoriously tide land, claimed by the

state, and from which the grantee was subsequently evicted by the state under claim of paramount title.

SAME—COVENANT AGAINST PERSONS—WHEN INCLUDES STATE.

A grantor who warrants his title generally against "all persons whatsoever" is liable thereon, although the outstanding paramount title rests in the state instead of in a person.

SAME—ACTION FOR BREACH—WHAT CONSTITUTES EVICTION.

When the paramount title is in the state and the covenantee in a deed from a private grantor is ordered by the state to either vacate or to purchase the land, and he accordingly purchases from the state in order to protect improvements made by him while in possession under his grantor's deed, the purchase must be considered such an eviction as to constitute a breach of the covenants of title and for quiet enjoyment.

SAME—LIMITATIONS.

The statute of limitations will not begin to run against an action for breach of covenants of warranty of title and for quiet enjoyment until the eviction of the grantee.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Reversed.

James Kiefer, for appellant.

Piles, Donworth & Howe, for respondent.

The opinion of the court was delivered by

WHITE, J.—Respondent moves to dismiss this appeal for the reason that no appeal bond has been executed or filed as required by the statute. The judgment appealed from was entered pursuant to an order sustaining the respondent's demurrer to appellant's complaint, appellant having elected to stand on its complaint, and the action having been accordingly dismissed on the merits. The judgment is that the plaintiff take nothing by the action, and that the defendant recover of the plaintiff its costs and disbursements to be taxed. From the recitals in the judgment it may be conceded that it is a final judgment on the merits. The record shows that the amount of the

costs and disbursements taxed is \$10. The judgment of dismissal, and the amount of costs taxed, are set forth in the recitals of the bond. The penalty of the bond is in the sum of \$250. The condition of the bond is to the effect that the appellant will pay all costs and damages that may be awarded against it on the appeal or on the dismissal thereof, not exceeding two hundred dollars, and will pay and satisfy and perform the judgment appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made, by the superior court from which the appeal is taken. The respondent contends that, inasmuch as the bond is both an appeal and supersedeas bond, the penalty, under § 6506, Ballinger's Annotated Codes and Statutes, should be in the sum of at least four hundred dollars. Under § 6506, *supra*, the penalty of an appeal bond shall not be less than two hundred dollars, and, in order to effect a stay of proceedings, where the appeal is from *a final judgment for the recovery of money*, it shall be in a penalty double the amount of the damages and costs recovered in such judgment; in other cases it shall not be less than \$200, and sufficient to save the respondent harmless from damages by reason of the appeal, as the judge of the superior court shall prescribe. While the judgment appealed from was a judgment for costs, it was as much a judgment for money as if it had been for a principal sum and costs. The statute is clear, and there is no room for construction. It means just what it says, viz., that all final judgments for money may be superseded on appeal by a bond for double the amount of such judgment. Here there is a judgment for ten dollars, and a bond in the penal sum of two hundred and fifty dollars. A bond for \$220 would have been sufficient and a literal compliance with the statute. The fact that

it is more than the exact sum cannot militate against the appellant. The purpose of a supersedeas bond is to protect the respondent in the collection of his judgment and in the enforcement of the relief awarded him by the judgment. All the respondent could obtain by this judgment was the sum of ten dollars. Upon the payment of this amount the respondent was bound to fully satisfy and discharge the judgment upon the records of the court. The bond in this case is more than double the amount of the money judgment appealed, and two hundred dollars additional, as required by law. Under the conditions of the bond, the respondent was fully secured in the amount recovered by it in the judgment, as well as for costs and damages up to two hundred dollars on appeal. The motion to dismiss the appeal is therefore denied.

The complaint in this action, omitting formal allegations, is substantially as follows:

“Second. That on or about the 22d day of October, 1889, the plaintiff purchased from the defendant a certain tract of land, situated in Ballard, King county, Washington, and paid part of the purchase money expressed in the deed hereinafter mentioned, and thereafter, on the 13th day of August, 1890, upon payment by the plaintiff of the balance of the cash consideration for said purchase, the defendant by its officers thereunto duly authorized made, executed, and delivered to the plaintiff its certain deed to said premises, in the words and figures following, to wit:

“ ‘This indenture, made the 13th day of August, 1890, between The West Coast Improvement Company, a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of Washington, the party of the first part, and the West Coast Manufacturing and Investment Company of Ballard, Washington, also a corporation, the party of the second part:

“ ‘Witnesseth, that the said party of the first part for and in consideration of seven hundred and fifty dollars

to it paid by the said party of the second part, does hereby grant, bargain, sell and convey to said party of the second part and to its successors and assigns forever, the following described tracts or parcels of real estate, lying and being in the county of King, state of Washington, and particularly bounded and described as follows, to-wit: Beginning at the corner of sections 11, 12, 13 and 14, Township 25 North, Range 3 East, thence north on the line between sections 11 and 12, 62 7-10 feet to the southerly margin of Shilshole Avenue, thence north 66 deg. 18 mins. west along said marginal line 252 feet to the easternmost corner of the tract described as follows: From its easternmost corner run thence S. 23 deg. 42 mins., west 330 feet; thence N. 66 deg. 18 mins., west 250 feet; thence N. 23 deg. 42 mins., E. 330 feet to the southerly line of Shilshole Avenue; thence S. 66 deg. 18 mins. E. along said marginal line 250 feet to the place of beginning, together with all the littoral, riparian and shore rights thereunto belonging or in any wise appertaining.

“ ‘Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining. And also all the estate, right, title and interest, at law and in equity therein or thereto.

“ ‘To have and to hold the said premises to the said party of the second part, and to his successors and assigns forever; and the said party of the first part does covenant with the said party of the second part and its legal representatives, forever, that the said premises are free from all incumbrances; and the said party of the first part will, and its successors and assigns shall warrant and defend the same to the said party of the second part, its successors and assigns forever, against the lawful claims and demands of all persons whatsoever. . . .’

“Third. That at the time of making said contract, to-wit: in October, 1899, the defendant had recently platted and laid out a townsite in the vicinity of and adjacent to the lands hereinbefore described, and had just placed the same upon the market, and had platted said townsite to deep water (and claimed to own and held itself out as the

owner of all the lands to deep water), and the actual consideration for said conveyance, in addition to the payment of seven hundred and fifty dollars in cash, was that the plaintiff should erect and put in operation in a short time a shingle mill and shingle manufacturing plant upon said premises for the purpose of aiding and promoting the sale of the lands of the defendant so platted and laid out into a townsite.

“Fourth. That, upon the making of said contract of sale and the payment of the first of said purchase money, defendant put the plaintiff into possession of said premises and plaintiff erected thereon valuable improvements, to-wit: A shingle mill and shingle manufacturing plant and put the same into operation, and expended in that behalf a sum exceeding ten thousand dollars, and established thereon a large and profitable business.

“Fifth. That afterwards, to-wit: On or about the 10th day of December, 1894, the state of Washington by its Board of State Land Commissioners, thereunto duly authorized by the laws of said state, laid claim to the title to the westerly part of said tract of land described in said deed, to-wit: to seventy-seven thousand, five hundred seventy-one and five-tenths (77,571 5-10) square feet of the premises conveyed by the said deed, and maintained and asserted the title of the state of Washington to the same as tide lands belonging to said state, and platted the same for sale as tide lands, and thereafter gave the plaintiff the option of purchasing said lands from the state of Washington, at a certain price placed thereon by the said state of Washington, or of vacating and relinquishing said premises.

“Sixth. That the title of said state of Washington to said lands was perfect and unassailable and a title paramount to that conveyed by the defendant to the plaintiff, and all of plaintiff's valuable improvements exceeding in value the sum of twenty thousand dollars and its business established and carried on on said premises were all situated on the tide lands of the state of Washington as shown by the plat hereunto annexed and made a part hereof and marked ‘Exhibit A,’ and in order to

protect and save the same plaintiff was obliged to pay and did pay to the state of Washington for said seventy-seven thousand five hundred seventy-one and five tenths (77, 571 5-10) square feet on said premises so conveyed by the defendant to the plaintiff the sum of one thousand five hundred twenty-two and 72-100 dollars (\$1,522.72) in lawful money, and acquired the title of the state thereto and received a conveyance therefor from said state of Washington.

“Wherefore, plaintiff demands judgment against the defendant for the sum of one thousand, five hundred twenty-two and 72-100 dollars (\$1, 522.72) and interest thereon from July 1, 1895, and costs of suit.”

The plat referred to in the complaint shows the upland portion of the tract to be a narrow strip of land, triangular in form, extending across the entire width of the tract, about eight feet wide on one side of the tract and thirty-one feet wide on the other side of the tract, lying between the line of Shilshole avenue on the east side and the meander line on the west side. The westerly part of said tract is tide lands. The harbor line, at the shortest distance, lies one hundred and fifty-one feet from the westerly boundary of the tract conveyed, and between it and the inner harbor line is Block 6 of Ballard tide lands, while other tide lands lie on the north and south sides of the tract specifically conveyed.

On motion of the respondent the words, “and claimed to own and held itself out as the owner of all the lands to deep water,” in the third paragraph of the complaint were stricken on the ground that the same were an irrelevant and immaterial allegation. This is assigned as error. This action is brought on an alleged breach of warranty contained in a deed executed August 13, 1890. The matter stricken by the court refers to a claim made by the respondent in the year 1889. If this was an action for deceit, misrepresentation, or fraud, the allegation

might be material. This action, however, is for the breach of a plainly written covenant. There is no ambiguity in the language of the deed. The intention of the parties must be derived from the deed itself. For these reasons we think the matter alleged was wholly immaterial, and it was properly stricken.

A demurrer was interposed on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law, and that several causes of action had been improperly united. This demurrer was sustained. The ruling of the court in this respect, as well as the judgment of dismissal on the refusal of the appellant to plead further, are assigned as error, and will be considered together. They raise squarely the broad question whether a warranty such as was given in this case covers tide lands, the paramount title of which was in the state at the time the deed was executed. The respondent contends that it does not, because it appears that at the time of the original arrangement for purchase, and also at the time the deed was made, that the portion of the premises for which appellant afterwards paid the state was openly, plainly, visibly, and notoriously tide land, of which the state was the owner; and, further construing the deed in the light of the physical facts which existed at the time as shown by the diagram referred to in the complaint, there was no intention on the part of the respondent, in using the general language embraced in the deed, to covenant against the rights of the state in the tide land portion of the premises; that the description of the premises in the deed sufficiently makes it known; that, so far as tide lands are concerned, it is only the littoral, riparian, and shore rights that are conveyed, and not the soil. The original contract, upon which the deed is founded, is not set forth

in the pleadings. The presumption is, if this was material, that the deed is in compliance with the contract. The general rule for the construction of covenants is that the intention of the parties, when it can be ascertained from the instrument, must govern, and to come at this all the parts of it must be considered together. The real meaning of the parties must be gathered from the instrument itself, and it is only when the meaning of the words used are doubtful that surrounding circumstances are to be considered, and parol proof is not admissible to explain the covenants in a deed where there is no ambiguity. *Clark v. Devoe*, 124 N. Y. 120 (21 Am. St. Rep. 652); *Easterby v. Heilbron*, 1 McMul. 462.

“The cardinal point is, what was the intention of the parties, as derived from the deed itself? When that is discovered, it ought to be carried into effect, if it can be done consistently with the rules of law. If the words and provisions are doubtful, they are to be taken most strongly against the grantor. If they are susceptible of different constructions, the court may take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted at the time of making the grant, for the purpose of ascertaining the probable intent.” WOODWORTH, J., in *Whallon v. Kauffman*, 19 Johns. 97.

“The words of the covenant itself are the primary source from which this intention is to be drawn. These are the symbols appointed by the parties to denote their purpose, and they are generally the best and surest guide to its discovery. Hence, when the covenantor has drawn a covenant in general and unqualified form, it must be presumed that he so intended it, and it will be so construed unless such presumption is utterly irreconcilable and incompatible with a limited covenant in the same deed.” 8 Am. & Eng. Enc. Law (2d ed.), 75, and cases cited.

This is the rule where the deed contains a covenant in general and unqualified form, together with limited

covenants; and we see no reason why the same rule should not prevail when circumstances outside of the instrument are invoked to limit the general covenant contained in the instrument. The words and provisions of the covenants in the deed are not doubtful, and they are, on the face of the deed, susceptible of but one construction. In such a case the intent of the parties must be ascertained from the deed itself, without regard to the circumstances attending the transaction and the state of the thing granted. The deed, in terms, by metes and bounds, purports to convey to the appellant a tract of land 330 feet long by two hundred and fifty feet wide; in all, 82,250 square feet. After the description of the tract conveyed in the granting clause, come these words:

“Together with all the littoral, riparian and shore rights thereunto belonging or in any wise appertaining. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, on in any wise appertaining. And also all the estate, right, title and interest, at law and in equity therein or thereto.”

We think that the littoral, riparian, and shore rights and tenements, hereditaments, and appurtenances here mentioned refer to those rights, etc., as they appertained to the tract described by metes and bounds, and not to the mere upland in the tract. The words, “and also the estate, right, title, and interest, at law and in equity therein or thereto,” also refer to the entire tract as described, and their insertion in the deed does not in any way limit or control the estate granted and conveyed by the words previously used in the granting clause, so as to restrict the grantee to the right, title, and interest only that the grantor actually had. These words were added rather for fullness and certainty, and not with a view of any limitation of the tract conveyed. *Hubbard v. Apthorp*, 3 Cush. 419. The word “premises,” used in the covenanting clause

in the deed, refers to the entire premises conveyed, upland as well as tide land. *Loomis v. Bedel*, 11 N. H. 74; *Bayley v. McCoy*, 8 Ore. 259.

There can be no question but that the covenant of warranty in the deed set out in the complaint referred to the entire tract described by metes and bounds. The covenant of warranty in the deed operates merely as an assurance of the title which the deed purports to convey. It does not pass any estate, or enlarge or restrict the estate conveyed.

“The obligation in a general warranty of title is not that the covenantor is the true owner, or that he is seized in fee with right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons thereafter asserted.” *Green v. Irving*, 28 Am. Rep. 366.

Parol evidence is not admissible to control the covenants in a deed. Why, then, should the knowledge or proof of physical facts be given this effect?

“Knowledge, or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for protection and indemnity against known and unknown incumbrances or defects of title.” *Copeland v. McAdory*, 100 Ala. 553 (13 South.545).

“It is a well-settled rule that knowledge by the grantee at the time of the conveyance, of the existence of an incumbrance on the land, or of a defect in the grantor’s title, does not control the force and effect of the express covenants in the deed or affect the question of breach.

“If the grantor wishes to exclude known defects or incumbrances from the operation of the covenants, he should do so by incorporating the intended limitation in the covenants themselves. Failing to do so he must be bound by the express words of the covenants, and cannot be permitted to destroy the force of their language by parol. Besides, it does not follow from the fact that the parties

had knowledge of a particular incumbrance on the land, or defect in the title, that they intended to exclude it from the protection of the covenants; men often take warranties knowing of defects in the title.

“The general rule above stated has been qualified in some of the United States. It has been held that a highway which is open and in use, so that the grantee must be charged with notice of its existence, is excepted from the protection of the covenants in a deed. And, again, it has been held that the covenants do not extend to apparent easements which openly affect the physical condition of the land, or, what amounts to the same thing, of which the grantee has knowledge. But these exceptions are contrary to the vast preponderance of authority, according to which the appropriate covenants in a deed, in the absence of statutory provision to the contrary, extend to public and private ways, and to other easements whether or not they affect the apparent physical condition of the land or are otherwise known to the grantee.” 8 Am. & Eng. Enc. Law (2d ed.), 86-88.

We have examined the long list of authorities cited to support the above text, and have no hesitation in saying that the author's conclusions are fully borne out by the authorities. But one case has been cited by respondent in opposition to the view here expressed, and that is the case of *Feurer v. Stewart*, 83 Fed. 793. The court in that case says:

“When an estate is conveyed by a deed describing it so that the parties must understand therefrom that the estate is subservient to a superior title, which cannot be extinguished nor acquired, the grantee takes it *cum onere*, and no right of action can accrue in his favor upon the covenants in the deed, unless in the covenant the grantor specifically agrees to stand liable for losses resulting from the assertion of such superior title. If not mentioned in the covenant, it will be presumed that the parties have made allowance for a known defect of title in fixing the purchase price, and the grantee, having only paid for what

he gets, cannot afterwards be heard to complain that he has been damaged by a broken contract on the part of the grantor. This case is distinguishable, by its peculiar facts and circumstances, from all precedents to which my attention has been directed; but the above propositions are applicable here, and the same are, in a measure, supported by the following authorities: Co. Litt. (Butler & Hargrave's Notes; 1st Am. from 19th London ed.) 384a; 2 Sugd. Vend. (8th Am. ed.) 230; *Montgomery v. Reed*, 69 Me. 510-516; *Holmes v. Danforth* (Me.) 21 Atl. 845; *Ake v. Mason*, 101 Pa. St. 17; *Kutz v. McCune*, 22 Wis. 628; *Barre v. Flemings* (W. Va.) 1 S. E. 731. The words of the covenant seem to indicate an intention in the minds of the parties to restrict the covenant to correspond to the known situation of the premises, so that the liability of the vendor shall not be greater than would be reasonable for her to assume. The covenant is not to defend against all lawful claims, but against all persons lawfully claiming or to claim. Now, the commonwealth is not a person, and its claim of title is not mentioned specifically, nor is it within the general terms of the covenant, if the words are to be considered as having been selected to accurately express the intention of the parties. Rawle, Cov. (5th ed.) p. 171; *McBride v. Board*, 44 Fed. 17; *In re Fox*, 52 N. Y. 535; *U. S. v. Fox*, 94 U. S. 315-321."

From this quotation it seems that the learned judge extends the exception to the rule that a covenantor is bound by the express words of his covenant so as to include not only an easement, but the principal subject-matter. He also, holds, contrary to any authority we have been able to discover, that, where the grantee knows of a superior title which cannot be extinguished or acquired, the grantor must expressly covenant to stand liable for losses resulting from the assertion of such superior title, or he will not be bound. The rule, as we understand it to be, is, as laid down in the text already cited from the 8th Am. & Eng. Enc. Law, that, where one covenants to warrant generally, he is bound to answer for all defects, and, if he desires to

avoid any particular defect, he must do so by a limitation in the instrument itself. Says BREWER, J., in *Barlow v. Delaney*, 40 Fed. 97:

“The very purpose of the covenant is protection against defects; and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one-half its value, besides destroying the force of its language. If from the force of a covenant it is desired to eliminate known defects, or to limit the covenant in any way, it is easy to say so. General in its language it reaches to all defects within its terms, known or unknown.”

With the exception of the case of *Feurer v. Stewart*, *supra*, the cases cited by the respondent are all cases of easement or servitude. The controversies in these cases arise over some physical easement or servitude only partially affecting the subject-matter of the grant, and the question is one of liability of the grantor for the depreciation of the estate to that extent. Here is plain failure of title to 77,571.5 square feet out of 82,250 square feet,—nearly all the land conveyed; and we do not think the grantor should be relieved from the plain provisions of his contract, to protect the grantee against the rightful claims of all persons, under the rule laid down by those courts excepting visible easements and servitudes from the covenant of general warranty or the warranty against incumbrances. Where the title to the land itself absolutely fails, and the grantee takes nothing by his deed but a mere fraction of the land,—as in this case,—we are at a loss to see how he can be said to take the land *cum onere*, for in fact he takes nothing. We have examined the authorities cited by the respondent in his brief, and on which the decision in *Feurer v. Stewart*, *supra*, is based, and they all relate to easements or servitudes, and in such cases it is said the grantee takes the land *cum onere*. The case of *Montgomery v. Reed*, 69 Me. 510, was where

there was a conveyance of tide flats, the title to which passed by the deed. The court held that the owner of the flats held them subject to the rule that, until he built upon or enclosed them, the public had a right to use them for the purpose of navigation while they were covered by the sea, and the right of the public to use them was not an incumbrance within the usual covenant against incumbrances. The case of *Holmes v. Danforth*, 83 Me. 139 (21 Atl. 845), was where land was conveyed by deed with covenant of warranty against incumbrances. The land was bounded by the center of a public road, and so described in the deed, so that from the instrument itself, without resort to oral testimony or extraneous evidence, knowledge of the fact was brought home to the grantee; and it was held that there was no breach of the covenant against incumbrances by reason of the road, and that the grantee took the land *cum onere*. In the case of *Ake v. Mason*, 101 Pa. St. 17, where a plan for laying out a street had been confirmed by the proper court, and was a public record, of which the purchaser was bound to take notice, a vendee of land could not recover damages from his vendor upon the opening of the street, on a covenant of general warranty and against incumbrances, for the portion of the land occupied by the street. In the case of *Kutz v. McCune*, 22 Wis. 628 (99 Am. Dec. 85), where at the time of the purchase a part of the land was overflowed by a mill pond created by a dam on land not belonging to the defendant, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question, it was held that, as the overflowed land was obviously, at the time of purchase, subject to the servitude or easement of the overflow of water from the dam, there was no breach of the covenant against incumbrances. In the case of *Barre v. Flem-*

ings, 29 W. Va. 314 (1 S. E. 731), it was held that the riparian proprietor of lands bounded by the Ohio river in the state of West Virginia owns the fee in the lands to low water mark, subject to the easement of the public for navigation in that portion lying between high and low water mark; and that, when land lying on the Ohio river is conveyed by deed with general warranty, and calling for low water mark on said river as one of its boundaries, the warranty is not broken by reason of the fact that the public owns an easement therein. In none of the cases cited to sustain the ruling of the court in *Feurer v. Stewart*, *supra*, did the title to the principal thing fail, as in the case at bar, and they were all cases involving the question of visible easements or servitudes over or annexed to the land, of which the grantee knew or was bound to take notice.

The additional case of *Janes v. Jenkins*, 34 Md. 1 (6 Am. Rep. 300), cited by the respondent, is also a case involving a visible servitude,—a window light,—in which it was held that the vendee of an adjoining tract, under the circumstances detailed in the case, took the land with the servitude annexed, and the enjoyment thereof by the owner of the adjoining lot constituted no breach of a covenant of special warranty. But it is claimed that, inasmuch as the covenant of warranty is against “all persons whatsoever,” that it is not a covenant against the state; that the state is not a person, and as the state is not mentioned specifically, it is not within the covenant. It is true that in some cases it has been held that the term “person” does not, in ordinary legal signification, embrace a state or government. There are many cases, however, to the contrary. *Martin v. State*, 24 Texas, 62; *State v. Herold*, 9 Kan. 194; *Republic of Honduras v. Soto*, 112 N. Y. 310 (19 N. E. 845, 8 Am. St. Rep. 744). The following

cases expressly hold that, although the outstanding paramount title may rest in the state or the United States, the grantor who warrants his title generally against all persons is liable upon his covenants of warranty. *McGary v. Hastings*, 39 Cal. 360 (2 Am. Rep. 456); *Green v. Irving*, (Miss.) 28 Am. Rep. 360; *Herrington v. Clark*, 56 Kan. 644 (44 Pac. 624); *Kansas Pacific Ry. Co. v. Dunmeyer*, 19 Kan. 539; *Meservey v. Snell*, 94 Iowa, 222 (62 N. W. 767, 58 Am. St. Rep. 391).

The covenant would certainly include a person claiming as grantee of the state, and for that reason we cannot see why it does not include the state itself. Where the paramount title is in the state, and the covenantee buys in the same under circumstances such as are detailed in the complaint, this will be considered such an eviction as to constitute a breach of the covenant of warranty or for quiet enjoyment. *Green v. Irving*, 28 Am. Rep. 360; Rawle, *Covenants for Title* (5th ed.), §§ 142, 143, 146; *Loomis v. Bedel*, 11 N. H. 75. The covenant against incumbrances is generally a covenant *in praesenti*, and is broken, if at all, at the time of conveyance. The covenant of warranty is a covenant *in futuro*, runs with land, and is broken at the time of the eviction. The covenant for warranty and that for quiet enjoyment are, in the main, identical. It has been said that the covenant for quiet enjoyment is to defend the possession, while the covenant of warranty is to defend not merely the possession, but also the land, and the estate in it. The deed set forth in the complaint contains a covenant to warrant and defend generally. The eviction set forth is under the superior title of the state. The action was commenced in September, 1899. The eviction took place in December, 1894, when the state claimed possession, and gave to the

purchaser the option of vacating that portion claimed by the state or purchasing its title. The six years statute of limitation had not then run. There has been no improper joinder of actions. The question of the measure of damages is not now before us. The court below should have overruled the demurrer. The judgment is reversed, and this action is remanded, with instructions to the court to overrule the demurrer; the appellant to recover the costs of this appeal.

REAVIS, C. J., and ANDERS, FULLERTON and DUNBAR, JJ., concur.

[No. 3740. Decided August 27, 1901.]

WILLIAM W. SEYMOUR, *Appellant*, v. ROBERT FROST,
as Treasurer of Thurston County, Respondent.

COUNTIES—FUND FROM WHICH BOND INTEREST PAYABLE.

Under the revenue law of 1897 (Laws 1897, p. 136), providing for but two county funds,—the “current expense fund” and the “county indebtedness fund,” and that “the tax for payment of county current expenses shall be based upon an itemized statement of the estimated county expenses for the ensuing fiscal year,” and that “the tax for the payment of county indebtedness shall be based upon the indebtedness of the county,” interest falling due upon county bonds issued under Laws 1887-88, p. 12, and Laws 1889-90, p. 37, is properly classed as county indebtedness and payable from the “county indebtedness fund,” in the absence of provisions in the acts authorizing such bonds limiting payment to the methods prescribed therein.

Appeal from Superior Court, Pierce County.—Hon. OLIVER V. LINN, Judge. Affirmed.

Stiles & Nash, for appellant.

George H. Funk, for respondent.

Aug. 1901.] Opinion of the Court—WHITE, J.

The opinion of the court was rendered by

WHITE, J.—This is a suit in equity on behalf of the appellant, and all others holding county warrants like himself, against the treasurer of Thurston county. The appellant avers that he is the owner and holder of warrants drawn on the general fund of the county. The controversy is over the question of the right of the respondent treasurer to pay the interest on two certain bond issues of the county out of moneys levied for the benefit of the “county indebtedness fund and moneys paid into the indebtedness fund from the various sources prescribed in the law of 1897, which created said “county indebtedness fund.” The appellant claims that the interest should not be paid out of said fund. The relief prayed for was denied by the court below. These bonds consist, first, of bonds in the amount of \$75,000, refunded under the act of 1887 and 1888 (pp. 12, 13); and, second, of bonds in the amount of \$150,000, issued under the Laws of 1889-90 (pp. 37-39). Appellant says, first, that the interest on the bonds refunded under the act of 1887 and 1888 should be paid by funds raised by special tax levied under the authority conferred by virtue of § 3 of said act; second, that the interest upon the other issue of bonds should be paid out of the “county current expense fund”; and that the only indebtedness than can lawfully be paid out of the “county indebtedness fund” is the general fund warrants of the county unpaid on the 1st day of February, 1898, that fund being, as the appellant claims, created solely for the redemption of the warrants outstanding on the date last above mentioned. Prior to the enactment of the revenue law of 1897, there were five general county funds, to-wit: “the salary fund,” created by the law of 1889 and 1890 (p. 314), which fund was created for the specific purpose of paying the salaries of

the various county officers, and from which no other expenses of the county could lawfully be paid; the "general fund," or "county fund," as it is sometimes spoken of in the statutes; the "road fund"; the "bridge fund"; and the "general school fund." See Laws 1893, p. 351, § 64. The refunding act of 1887-88 provides that there shall be levied each year a tax upon the taxable property of the county sufficient to pay the interest on the bonds refunded as the same accrues. Section 3, p. 13, Laws 1887-88. The act of 1890 authorizing counties to contract indebtedness and issue bonds therefor, provides that the bonds shall bear interest at a rate not exceeding 7 per cent. per annum, payable annually, with coupons attached for each interest payment; and that the interest coupons shall be considered for all purposes as warrants drawn upon the general fund of the county. Sections 4, 8, pp. 38, 39, Laws 1889-90. The law of 1897 relating to revenue and taxation provides:

"The tax for payment of county current expenses shall be based upon an itemized statement of the estimated county expenses for the ensuing fiscal year. . . . The tax for the payment of county indebtedness shall be based upon the indebtedness of the county: . . . provided that all collections made on and after the first day of February, 1898, for delinquent county taxes for the year 1896 and prior years, be credited to the county indebtedness fund, and with the taxes collected from the levy for payment of county indebtedness shall be paid and applied upon the county indebtedness outstanding on said 1st day of February, 1898." Laws 1897, p. 166, § 62.

The record in this case shows that the county commissioners of Thurston county, Washington, in making the tax levy for the years 1897, 1898, and 1899, respectively, based their levy for the "indebtedness fund" upon the unpaid indebtedness of the county, including both bonded indebtedness and warrant indebtedness, and made one

Aug. 1901.]

Opinion of the Court—WHITE, J.

joint levy of $2\frac{1}{2}$ mills upon the taxable property of the county in each of said years for the benefit of the "county indebtedness fund"; that no separate levy was made during said three years for the payment of bond interest or warrant indebtedness, and no levy whatsoever was made during said three years above referred to for either of said purposes, except the joint levy of $2\frac{1}{2}$ mills as above recited. The agreement between the county and the holders of the bonds issued under the acts of 1887-88 and 1890 is that the county will pay interest on the bonds at the rate specified, not that it will pay it out of any particular fund. There is nothing in the law under which the bonds were issued providing for a particular fund out of which to pay the interest. The law of 1887-88 simply provides that there shall be levied each year a tax sufficient to pay the interest. The law of 1890 is silent as to the levy of a tax to pay the interest, but provides that the interest shall be paid annually, and that the interest coupons shall be the same as warrants drawn on the general fund of the county. The interest on both issues of bonds is an indebtedness of the county, and the power even to levy a special tax to pay the interest is not to be construed as the only method of paying unless the act granting the power expressly so provides.

"The bonds and other negotiable paper issued by a municipality ordinarily are general debts, and the holder is entitled to have them paid out of the general funds of the city; and it is to be inferred that the legislature intends to authorize it to raise and pay them, and the interest thereon, as it falls due, by taxation, unless there is in the act authorizing the issue, or some general law, a limitation upon the power of taxation, which repels such an inference." *Simonton, Municipal Bonds*, § 134; *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. Law, 235; *United States v. Clark County*, 96 U. S. 211; *Avery v. Job*, 25 Ore. 512 (36 Pac. 293).

In § 62, Laws 1897, *supra*, the legislature speaks of the indebtedness of the county in general terms, showing that it had in mind all classes of county indebtedness. The object of this provision was to place counties upon a cash basis by providing a new fund for the current expenses of the county independent of the existing indebtedness, while at the same time making provision for payment of such indebtedness by the creation of the indebtedness fund. If the levy made to pay this indebtedness, including outstanding warrants and interest on bonds, is insufficient, the commissioners may be required to increase the levy up to five mills. The appellant does not invoke such a remedy in this case. We think the indebtedness fund provided for in § 62, *supra*, is the fund out of which the interest on the bonds in question, as well as warrants evidencing other indebtedness of the county, must be paid.

The judgment of the court below is affirmed, with costs to respondent.

REAVIS, C. J., and FULLERTON, DUNBAR, and ANDERS, JJ., concur.

[No. 3619. Decided August 30, 1901.]

P. J. FLINT, *Appellant*, v. FRANK HORSLEY *et al.*, *Respondents*.

COUNTIES—BOARD OF COMMISSIONERS—POWERS—ESTABLISHMENT OF COUNTY ROADS.

Under Bal. Code, §§ 3771-3782, prescribing the method of procedure for the establishment of roads by the county commissioners, and providing that a petition therefor must be presented by householders residing in the vicinity of the proposed road setting forth its terminal points, its course and width; that viewers shall be appointed to view, lay out and survey the same as nearly as practicable in accordance with the petition, and make report thereon to the board; that the board must thereupon

Aug. 1901.] Opinion of the Court—FULLERTON, J.

order a hearing, of which notice must be given to those interested in the lands to be taken, and that the board shall thereafter declare "whether the road shall be established in accordance with the report of the viewers, or otherwise, or at all," the county commissioners have no authority upon the hearing of an adverse report thereon by the viewers, to order the establishment of a road along another route and reaching a different terminal than the one viewed, surveyed and reported upon by the viewers.

Appeal from Superior Court, Yakima County.—Hon. JOHN B. DAVIDSON, Judge. Reversed.

Whitson & Parker, for appellant.

John B. Rudkin, and *Frank H. Rudkin*, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—This is an appeal from the judgment of the superior court of Yakima county, refusing to vacate and set aside an order of the board of county commissioners of that county establishing a county road and vacating a part of an established road. From the record it appears that E. O. Keck and others presented a petition to the board of county commissioners of Yakima county praying for the establishment of a county road over and along a route described as follows: "Commencing at the county road on the north west corner of section twenty-six, township eleven north, of range twenty east, Willamette Meridian; running thence east, to the north east corner of the north west quarter of the north west quarter of said section; thence south, to the south east corner of said quarter quarter; thence east, forty rods; thence south, eight rods; thence east, one hundred and thirty rods; thence south, eighty rods; thence east, seventy rods to the east line of said section; thence south, to a county road laid out and established on the bluff of said section twenty-six about forty rods and ending at said

point;" and further praying that an existing county road between the termini of the proposed road be vacated. On the presentation of the petition the usual order was made by the board, appointing viewers to examine the route of the proposed road, view, lay out, and survey the same, and to make a report of their doings in conformity with the requirements of the statute. The viewers so appointed, after an examination and survey of the proposed route, reported that it was not a necessity, and ought not to be established and opened, but did not report upon the feasibility or cost of any other route than the one petitioned for, which could subserve the same purpose. On the filing of the report of the viewers with the board of county commissioners, a hearing was had thereon, at which they ordered the establishment of a county road over a route described in the order as follows: "Commencing at the county road on the north west corner of section 26 in township 11 north, of range 20 east, W. M., said point being the center line of said road; running thence south, along the section line 20 chains more or less to a point on said section line 20 feet north of the southwest corner of the north west quarter of the north west quarter of said section 26; thence east, 20 chains more or less, parallel and 20 feet north of the south line of said forty acres, to a point on the east line of said forty acres; thence south 20 feet; thence east, 10 chains more or less on the south line of the northeast quarter of the northwest quarter of said section 26, to the northeast corner of the west half of the southeast quarter of the northwest quarter of said section 26; thence south, 25 chains more or less to the top of the bluff; thence southeasterly along said bluff on a grade to be established, to a point on county road No. 23 at the foot of said bluff as now established;" and ordered that the existing road between the commencement and terminating points of the

Aug. 1901.]

Opinion of the Court—FULLETON, J.

newly established road be vacated. It appears from the maps accompanying the record that there is a wide difference between the road petitioned for and surveyed and the one the board attempted to establish. While the starting point of each is the same, they terminate at points nearly half a mile apart. The road petitioned for is over a mile and three-quarters in length, while the one attempted to be established is but little more than one mile. The former passes on the north and west sides of the forty-acre tract on the northeast corner of the section described, while the latter passes on its west and south sides. It is evident also, that the established road follows the line of the survey made by the viewers for about three-eighths of a mile only; that for the remainder of the way its courses and distances are estimated, and there has never been any survey of the road as established, and, of course, no data prepared from which its actual location upon the ground can be accurately determined.

A board of county commissioners is a tribunal of special and limited jurisdiction. Its powers are wholly statutory. It must act, if it acts legally and within its authority, in substantial accord with the statute granting its powers. In proceedings to lay out and establish a county road, the statute requires that a petition in writing be presented to the board, signed by at least ten householders of the county residing in the vicinity of the proposed road. The petition must set forth the terminal points of the proposed road, the course, the width, and that the proposed road is practicable, and will be of general use and public utility. Upon the filing of the petition, the board, if it is satisfied that the petition contains the matters and things required by law to be set out therein, shall appoint three disinterested persons as viewers, one of whom must be the county surveyor or his deputy, whose duty it

is to examine the route of the proposed road, view, lay out, and survey the same in accordance with the petition, as nearly as practicable, and mark plainly the course of the road as surveyed. When the view and survey is completed, the viewers must file a report in writing with the board of county commissioners, showing, among other things, the terminal points, course, and length of the road as laid out and surveyed, and their opinion as to the necessity of the road, and whether the same ought to be established and opened or not; and they may, in their discretion or by order of the board, report upon the feasibility and cost of any other route than the one petitioned for, which could subserve the same purpose. After the report of the viewers is filed, it is the duty of the board to order a hearing thereon, of which notice must be given to the owners, lessees, and incumbrancers of the lands to be taken for such road, and at which they shall hear and consider all testimony and documentary evidence adduced for and against the establishment of the proposed road, "and shall, at that time or as soon thereafter as may be, declare by order the decision of the board: (1) As to whether the road shall be established in accordance with the report of viewers, or otherwise, or at all," (Bal. Code, §§ 3771-3782.)

It seems to us clear from the statute that the board of county commissioners, when petitioned to establish a county road, must, if it establishes the road at all, establish it along the route, or, if more than one is reported, along one of the routes, viewed and surveyed by the viewers. It is to this question that the hearing is directed, and only those persons whose property would be taken by the establishment of the road as surveyed are required to be notified of the hearing. What may be the proper construction of the phrase "or otherwise," in the section

of the statute above quoted from, it is not necessary here to determine. We are satisfied, however, that it cannot be held to confer power upon a board of county commissioners to establish a road along a different route from that laid out and surveyed by the viewers.

The order of the board in the matter before us was in excess of its powers and void. The judgment appealed from will, therefore, be reversed, and the cause remanded with instructions to the lower court to direct that it be vacated.

REAVIS, C. J., and DUNBAR, WHITE and ANDERS, JJ., concur.

[No. 3659. Decided August 30, 1901.]

THE SPOKANE and IDAHO LUMBER COMPANY, *Appellant*, v. CHARLES P. STANLEY *et al.*, *Respondents*.

JUDGMENTS—VACATION—PROCEDURE—WHEN MAY BE BY MOTION.

An application under Bal. Code, §4953, for the vacation of a judgment upon the grounds of mistake, inadvertence, surprise, and excusable neglect is properly made by motion, since the procedure by petition for the vacation of judgments is applicable only to the particular cases set forth in Bal. Code, § 5156, which specially prescribes the procedure to be followed in those cases alone. (*Whidby Land, etc., Co. v. Nye*, 5 Wash. 301, explained.)

SAME—NOTICE.

Three days' notice of hearing upon a motion made for the vacation of a judgment upon the grounds afforded by Bal. Code, § 4953, is sufficient, under Bal. Code, §4886a, which provides that after a party has appeared in an action he shall be entitled to three days' notice of any trial, hearing, motion, application, or proceeding therein, since the twenty days' notice required by Bal. Code, § 5157, upon the filing of a petition to vacate a judgment is confined only to the special proceedings pointed out in the chapter of which it forms a part. (*Chehalis County v. Ellingson*, 21 Wash. 638, overruled.)

25	653
125	670
25	653
28	165
25	653
83	82

SAME—PREMATURE HEARING—HARMLESS ERROR.

The action of the court in setting a motion for the vacation of a judgment for hearing upon the third day after service of notice thereof, while the court rules forbid the court from setting causes, except emergency cases, for hearing earlier than ten days after being noted for that purpose, will be presumed harmless error, in the absence of a showing that it resulted in prejudice.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Lewis & Lewis, for appellant.

Voorhees & Voorhees, Albert Allen and Frank S. Allen, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—This is an appeal from an order setting aside and vacating a judgment. The judgment vacated was entered in an action brought to foreclose a mechanic's lien, in which issue of fact had been regularly joined, and after a trial had thereon, of which the respondents had no notice, and at which they did not appear. The application to vacate was made by motion, based upon the grounds of mistake, inadvertence, surprise, and excusable neglect, the facts thereof being shown by affidavits attached to, and served upon the appellant with the motion. The judgment sought to be vacated was entered on the 13th day of October, 1899, and the motion to vacate was served on the 20th of the same month. Notice of the time and place of hearing the motion was served upon the 25th, fixing the time of hearing for the 28th. The appellant appeared specially at the time appointed, and objected in writing to the hearing of the motion, basing its objection upon several grounds, three of which are relied upon here for reversal. It is said—First, that the court erred in holding that the application to vacate the judgment

could be made by motion; second, that the notice given of the hearing of the motion was insufficient as to time; and, third, that the court prematurely set the motion for hearing.

It is the contention of the appellant that the application to vacate the judgment should have been made by petition, in accordance with the procedure pointed out in ch. 17, tit. 28, Bal. Code; that this chapter provides the only method by which the court can obtain jurisdiction of the subject matter of the proceeding and the parties thereto, and that this court so held in the case of *Whidby Land, etc., Co. v. Nye*, 5 Wash. 301 (31 Pac. 752). The first section of the chapter of the Code cited (§ 5153) enumerates eight different causes for which judgments may be vacated. By § 5156 it is provided that the proceedings to obtain the benefit of six of these causes shall be by petition, verified by affidavit, setting forth the judgment, the facts or errors constituting a cause to vacate it, and, if the party is a defendant, the facts constituting a defense to the action; and by § 5157, that the party shall be brought into court in the same way, and on the same notice as to time, as in an original action. No form of procedure is prescribed in this chapter for vacating judgments for the other two causes enumerated in § 5153; and by § 5161 it is expressly provided that the provisions of the chapter shall not be so construed as to affect the power of the court to vacate judgments, as elsewhere provided in the Code. It would seem from this that the legislature recognized other forms of procedure for vacating judgments than the one here particularly mentioned, and intended that this form of procedure should be exclusive only when the application was made under one or more of the causes therein especially enumerated. The cause for which the trial court vacated the judgment in the case before us is

not one of the causes mentioned in § 5153 above cited. These causes are found in § 4953, under the chapter of the Code relating to mistakes and amendments. It is there provided that the court may, in furtherance of justice, upon such terms as may be just, and upon payment of costs, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. No form of procedure is prescribed for an application made under this section, nor is the form or time of the notice especially prescribed. We must, therefore, look to the general provisions of the Code relating to notice and procedure, for rules governing the practice under this section, rather than to the special provisions made applicable to particular cases. Under the Code, a judgment is the final determination of the rights of the parties in the action; an order is every direction of a court or judge, made or entered in writing, not included in a judgment; and a motion is an application for an order. Bal. Code, §§ 5080, 5080a. Within these definitions it is clear that an application to vacate a judgment is an application for an order, and it seems equally clear that an application therefor can be made by motion in all cases, and for all causes, where the procedure is not distinctly prescribed, and it is not necessary to bring persons not parties to the judgment before the court. The case of *Whidby Land, etc., Co. v. Nye, supra*, is not an authority against this conclusion. While it does not appear from the report of the case, the record shows that the cause for which the application was made was one of those enumerated in § 5153, which § 5156 especially requires shall be by petition.

The statute relating to notice (§ 4886a, Bal. Code) provides that after a party has appeared in an action he shall be entitled to three days notice of any trial, hearing, mo-

tion, application, or proceeding therein. Time is computed (§ 4896) by excluding the first day and including the last. Under these statutes, if they are to be permitted to govern in the case before us, the notice was sufficient as to time. It is said, however, that they have no application to motions of this character, and that this court in effect so held in the case of *Chehalis County v. Ellingson*, 21 Wash. 638 (59 Pac. 485). In that case we did say that § 5157, requiring twenty days notice to be given in a procedure had to vacate a judgment, applied to § 4953, but more mature consideration has convinced us that we were in error. It is our opinion now that the section cited applies only to the special proceedings for vacating judgments pointed out in the chapter of which it forms a part, and that the general statute relating to notice applies to all other cases. This, we think, is in accord with the usual practice followed by the superior courts; and, while we regret to do so, it is better that we overrule the case relied upon than to allow it to overturn the established practice.

Finally, it is said that the court erred in hearing the motion before the expiration of ten days after it was noted for setting. This contention is based upon the rules of the superior court. The appellant has caused a copy of so much of these rules as presents the question to be certified to this court by the clerk, but, treating them as properly before us, we find nothing therein upon which the appellant can predicate error. In themselves, they provide that the clause forbidding the setting of causes for hearing earlier than ten days after being noted for that purpose, shall not apply to emergency cases. It is true the record is silent as to the cause which induced the court to hear the case within the rule time, but error is not presumed; and before the appellant can be heard to

complain, he must show not only a violation of the rule, but that it resulted to his prejudice. Nothing of this kind appears.

Finding no error in the record, the order will stand affirmed.

REAVIS, C. J., and DUNBAR, WHITE and ANDERS, JJ., concur.

[No. 3661. Decided August 30, 1901.]

JOHN H. GRIFFITH *et al.*, *Appellants*, v. JAMES MAXWELL, *Respondent*.

JUDGMENTS—VACATION—PROCEDURE—MAY BE PRESENTED BY MOTION.

A judgment which has been irregularly obtained may be vacated and set aside by the court on motion therefor, although a remedy by petition is afforded by Bal. Code, § 5156.

JUDGMENT ON PLEADINGS—AMOUNT OF RECOVERY—RESTRICTED TO ADMISSIONS IN ANSWER.

A judgment upon the pleadings in an action to recover the price of goods sold to defendant upon a mutual and open account, is properly restricted to the amount admitted in the answer to be due, rather than that claimed by the complaint, although the reply may set up matter tending to show the correctness of the complaint and the error of the answer, since the affirmative averments of the reply are presumed to be denied, and plaintiff could consequently recover on none of the disputed items without proof of its correctness.

APPEAL—REVIEW—SUFFICIENCY OF RECORD.

Alleged errors of the trial court will not be reviewed on appeal, where the questions raised are not sufficiently presented in the record.

Appeal from Superior Court, Spokane County.—Hon WILLIAM E. RICHARDSON, Judge. Affirmed.

Lewis & Lewis, for appellants.

Crow & Williams, for respondent.

Aug. 1901.] Opinion of the Court—FULLERTON, J.

The opinion of the court was delivered by

FULLERTON, J.—This cause was formerly before this court on the appeal of the present appellants, *Griffith v. Maxwell*, 19 Wash. 614 (54 Pac. 35). After the remittitur went down, the appellants, without notice to the respondent, and in his absence, procured the court to enter a judgment in their favor for the sum of \$550.88, the amount demanded in the complaint. This judgment was afterwards, upon motion of the respondent, vacated and set aside, and the cause reinstated upon the trial docket of the court for further proceedings. Subsequently the appellants moved for judgment upon the pleadings, which motion, after notice and hearing, the court granted, rendering a judgment for the appellants for the amount admitted to be due them in the answer of the respondent, namely, \$274.36.

The appellants assign error upon the order of the court vacating and setting aside the judgment entered upon the return of the remittitur, the grounds thereof being that the application should have been made by petition, and not by motion. The objection, however, is not well taken. The ground of the motion was irregularity in obtaining the judgment, the same being entered in the absence of, and without notice to, the respondent. For this ground the Code expressly provides that the procedure shall be by motion, served upon the adverse party or his attorney. Bal. Code, § 5155. It is true that this cause for vacating judgments is the one mentioned in the third subdivision of § 5153 of the Code, and that § 5156 enumerates it among those to obtain the benefit of which the application must be made by petition. But an examination of the original enactments convinces us that its enumeration in § 5156 was a mere inadvertence on the part of the legislature. See Laws 1875, p. 20; Laws 1891,

p. 44. However, were the fact otherwise, the result would not be different. The remedy by motion is still retained, and it was not error on the part of the trial court to permit it to be pursued in the case before us.

It is next contended that the court erred in rendering judgment for the sum admitted in the answer to be due the appellant, instead of the sum demanded in the complaint. In the complaint it is alleged that between certain dates named the appellants sold and delivered to the respondent goods, wares, and merchandise of the reasonable value of a certain named sum, and that a certain other sum had been paid thereon, leaving a balance due of \$550.88, for which amount judgment was demanded. The answer, after appropriate denials, averred that the parties were both engaged in the same business,—that of plumbing and heating,—and had mutual dealings, in which they furnished each other with goods; that the respondent had turned over to the appellants certain accounts due him from his customers, and had paid appellants a large sum in cash. The account was in part itemized, and a balance struck, showing that respondent was indebted to the appellants in the sum of \$274.36, for which sum he tendered judgment against himself in favor of the appellants. For reply the appellants denied the correctness of the respondent's account, and stated their version of the account between the parties, showing in detail the items from which the lump sums set forth in the complaint were made up. The appellants attempt to show that on the face of these pleadings they are entitled to judgment for the amount demanded in their complaint. The reasoning by which they reach the conclusion is novel, if not ingenious, but we are not convinced of its soundness. Clearly, upon none of the disputed items could the appellants recover without proof of its correct-

Aug. 1901.]

Syllabus.

ness; and an item is as much disputed when set out in the reply, and denied by operation of the statute, as it is when set out in the complaint, and denied directly by the answer.

The appellants also assign error upon the ruling of the court dissolving an attachment issued at the commencement of the action. This assignment appears, however, to be based upon a misapprehension of the facts shown by the record. It is said, first, that the motion to dissolve was made before the respondent had appeared in the main action; and, second, that the court permitted the respondent to read affidavits at the hearing upon the motion to dissolve, which had not been served upon the respondent, and after notice that the respondent would rely upon oral evidence. As to the first part of the objection, the record shows that the respondent did appear generally in the action prior to the time he moved to dissolve the attachment; and as to the second the record is silent as to the procedure followed. The first ground is, therefore, clearly untenable, and the second cannot be considered, because the record fails to present the question sufficiently for review.

The judgment is affirmed.

REAVIS, C. J., and DUNBAR, WHITE and ANDERS, JJ., concur.

[No. 3688. Decided August 30, 1901.]

CHARLES S. CLARKE, *Appellant*, v. JOSEPH CLYDE, SR.,
et al., *Respondents*.

REPLEVIN — NOT MAINTAINABLE AGAINST ONE IN ADVERSE POSSESSION
WHO SEVERS LOGS FROM REALTY.

The owner of lands, who is not in possession thereof, cannot maintain replevin for the recovery of saw logs severed from the land by one in adverse possession thereof under claim of right.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Affirmed.

Hogan & Abel, for appellant.

J. C. Cross, for respondents.

PER CURIAM.—The appellant brought this action to recover from the respondents certain saw logs, alleging in his complaint that he was the owner and entitled to the immediate possession of the same. The answer, so far as it is necessary to be considered, was a general denial of the allegations of ownership and right of possession in the appellant. The trial developed the following facts: In June, 1890, the respondent, Joseph Clyde, Sr., acquired title from the United States to the lands upon which the logs in controversy were grown. After the issuance of the patent, Clyde and his wife executed two mortgages upon the lands to secure certain indebtedness owing by them; the first in 1891, and the second in 1893. In 1895 these mortgages came into the possession of the receivers of the Aberdeen Bank, and during the same year were by them foreclosed in separate actions, the decrees of foreclosure being entered on the same day, namely, August 9, 1895. An order of sale was issued on one of these decrees, and the land sold thereunder to the receivers on the 16th day of September, 1895. On the 18th of September the receivers entered into a contract with the mortgagors, in which it was agreed that the mortgagors should cut and sell from off the mortgaged lands sufficient logs to satisfy and discharge the mortgage indebtedness. The mortgagors entered at once upon the performance of the contract, and while engaged thereon the interests of the receivers in the property were transferred and conveyed to the appellant, Clarke. Clarke thereupon brought an action upon the contract, alleging

Aug. 1901.]

Opinion Per Curiam.

non-performance on the part of the Clydes. This action was prosecuted to judgment, in which the amount due from the Clydes to Clarke was determined, and certain moneys earned under the contract were directed to be collected, and certain undisposed of property was ordered sold, and the several amounts were directed to be applied, when received, upon the amount so found to be due. Thereafter various sums of money were collected and applied on the judgment, leaving a balance, however, unprovided for. This balance the Clydes tendered to the sheriff upon an application to redeem the lands from the mortgage sale. The sheriff refused to issue a certificate of redemption, whereupon a suit to redeem was begun by the Clydes, which appears to have been pending at the time of the trial of this action. The logs in controversy were severed and removed from the lands by the Clydes after the attempted redemption was made. At that time the respondents were in the sole and undisturbed possession of the lands, claiming the same adversely to all the world. It appears further that neither the receivers of the Aberdeen Bank nor their successor in interest, the appellant herein, ever had possession, or ever undertook to take possession, of the lands from which the logs were taken. The jury returned a verdict for the respondent, upon which the judgment appealed from was entered.

In *Churchill v. Ackerman*, 22 Wash. 227 (60 Pac. 406), this court held that the owner of land out of possession could not recover in replevin or conversion for crops grown upon such land from one in possession holding adversely to the true owner; that he must first recover possession of the land, when he might maintain his action for mesne profits and for waste, but that crops and other products of the soil, when severed therefrom, became chattels, and the property of the person in possession. Quot-

ing from the case of *Brothers v. Hurdle*, 10 Ired. 490 (51 Am. Dec. 400), it was said:

“But when one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land; for his title is divested—he is out of possession, and has no right to the immediate possession of the thing, nor could he bring any action until he regains possession. . . . The owner of the land cannot sue for the thing severed in trover or detinue as a chattel; for it is not his chattel—it did not become so at the time it was severed, and the title to it as a chattel cannot pass to him afterward, when he regains the possession, by force of the *jus postliminii*.”

The principle of this case is decisive of the one before us. The appellant was out of possession of the land at the time the logs were severed and removed. The respondents were in possession, holding the lands adversely to him under a claim of right. The appellant cannot, therefore, maintain an action against them for the recovery of the logs removed, or for their value; and, as but one judgment could be entered upon the undisputed facts of the case, it is unnecessary to discuss the many errors the appellant has assigned for reversal.

Affirmed.

[No. 3710. Decided August 30, 1901.]

FRED E. FERGUSON, *Respondent*, v. J. HOSHI, *Appellant*.

UNLAWFUL DETAINER — NOTICE TO QUIT — SUFFICIENCY.

Under Bal. Code, § 5527, authorizing an action of unlawful detainer, where notice to quit has been served upon a tenant “more than twenty days prior” to the end of the month or period for which rent was reserved, it is sufficient to give twenty days’ notice prior to the end of the month or period, excluding the day of service.

Aug. 1901.] Opinion of the Court—REAVIS, J.

JUDGMENT BY DEFAULT — REVIEW ON APPEAL.

Judgment by default for not answering within the time prescribed by rules of court after the overruling of a demurrer to the complaint will not be disturbed on appeal, when there is nothing in the record showing that defendant was entitled to an extension of time for answering.

SAME — DAMAGES RECOVERABLE.

Upon a judgment by default, without the introduction of proof, plaintiff is entitled merely to nominal damages instead of the amount prayed for in his complaint.

Appeal from Superior Court, King County.—Hon. FRANK T. REID, Judge. Modified.

Fred H. Peterson, for appellant.

Richard Gowan, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Action for unlawful detainer. A general demurrer was interposed to the complaint. The contention that more than twenty days' notice to quit could not be included within the days mentioned in the complaint was determined adversely to appellant in the case of *McGinnis v. Genss*, ante, p. 490 (65 Pac. 755). The demurrer was overruled on the 28th of April, 1900, and an exception noted, and on May the 6th following, judgment by default was entered in favor of plaintiff, granting restitution of the premises involved, and for double damages in the sum alleged in the complaint. Error is assigned by appellant on the order entering judgment of default, on the ground that the 30th of April, two days after the overruling of the demurrer, a written demand was served upon the attorney for respondent, requesting that a copy of the notice to quit be served upon attorney for appellant, and that such demand was filed in court, and that under the rules of the superior court of King county, and § 4930, Bal. Code, the time for answer was enlarged be-

yond May 6th, when the judgment was entered. An examination of the transcript shows the overruling of the demurrer, and the demand made on the 30th of April for a copy of the notice to quit, but the record is silent as to a refusal to furnish the notice, or as to whether extended time to answer was requested of the superior court. Upon the record, error cannot be presumed against the judgment. But it does appear that the court entered judgment for damages in the sum of one hundred and fifty dollars, reciting that the amount was twice that alleged in the complaint, and without hearing evidence upon the assessment of the damages. Exception was duly taken to that part of the judgment awarding the damages. It seems clear that the assessment of damages must be made upon proof. Bal Code, § 5090. The amount of damages is not confessed by default or failure to answer. See, also, 1 Sutherland, Damages (2d ed., 907-913), *pp. 773-8; *Slater v. Skirving*, 51 Neb. 108 (70 N. W. 493, 66 Am. St. Rep. 444). The judgment upon default, granted by the court, entitled the plaintiff to recover the possession of the premises, and to nominal damages only, which is one dollar or less. Following the practice pursued in *Trumbull v. School District*, 22 Wash. 631 (61 Pac. 714), the judgment in this cause is modified to be for damages in the sum of one dollar, and, as so modified, it is affirmed; appellant to recover the costs of appeal.

DUNBAR, WHITE and FULLERTON, JJ., concur.

[No. 3741. Decided August 30, 1901.]

THOMAS WILLIAMS, *Appellant*, v. JAMES BREEN, *Respondent*.

JUDGMENTS — VACATION — PROCEDURE — JOINDER OF CAUSES.

The fact that the proper procedure for the vacation of a judgment upon the grounds stated in Bal. Code, § 4953, is by motion,

Aug. 1901.] Opinion of the Court—FULLERTON, J.

while the procedure prescribed for the vacation of judgment for one of the causes provided in Id. § 5153 is by petition, would not preclude the applicant from presenting by way of petition his demand for relief, based upon a joinder of the causes of action provided for under those two sections of the Code.

SAME — NECESSITY OF VALID DEFENSE — HOW DETERMINED.

Bal. Code, § 5158, which provides that a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered, does not contemplate a trial upon the merits, but merely that the court shall find that the facts alleged constitute a defense to the cause of action upon which the judgment is founded and that there is substantial evidence in support thereof.

Appeal from Superior Court, Stevens County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

J. A. Kellogg and Robertson & Miller, for appellant.

Voorhees & Voorhees, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The appellant, who was plaintiff below, obtained a judgment by default against the respondent in the superior court of Stevens county for personal injuries alleged to have been sustained by him while working in a smelter then being operated by the respondent and another. The judgment was entered upon the 13th day of October, 1899. On January 2d following the respondent filed a petition, praying for the vacation of the judgment and for permission to appear and defend the action upon its merits. In his petition he alleged, in substance, that the affidavits filed to show service of summons upon him did not truthfully recite the manner of the attempted service, and that in fact no service of summons in the manner required by statute had ever been made upon him; that, notwithstanding this fact, he had intended in good faith to appear in the action and defend the same upon its merits; that to this end, prior to the

expiration of the time for answering the complaint, he sought one of his co-defendants, and was informed by him that a firm of attorneys had been retained to defend the action for all of the defendants; and that, relying upon such information, and the positive belief that his interests were being taken care of, he took no further steps looking to his appearance or defense; that from this time until after the judgment was entered against him he understood and believed that his appearance had been made in the action, and that his rights were being protected, and learned for the first time after the judgment had been entered against him that no appearance had been made for him; that the failure of the attorneys employed by his co-defendants to appear for him was due to a misunderstanding between them and his co-defendants as to the scope of their employment. He further alleged that he had a valid defense to the merits of the action,—the facts constituting such defense being set out in detail. The appellant demurred to the petition on the ground that it did not state facts sufficient to entitle the respondent to the relief asked, which demurrer being overruled, he answered, putting in issue the facts alleged. Subsequently a trial was had in which both parties introduced evidence. From the evidence the court found the facts substantially as alleged in the petition; and as conclusions of law therefrom found that the respondent, “by the filing of his said petition, in said action, in the manner and form in which the same was filed, without specially limiting such petition to the question of the service of the summons and complaint in said action, has waived such question and has submitted himself generally to the jurisdiction of the court in said action, and that said defendant, James Breen, is not entitled to have said judgments, or either of them, vacated because of any

Aug. 1901.] Opinion of the Court—FULLERTON, J.

failure in the service of the summons and complaint upon him in said action," but that he was entitled to have the judgment vacated on the other facts found by the court. An order vacating the judgment was entered accordingly. This appeal is from that order.

The learned counsel for the appellant contend that because the respondent has elected to follow the procedure for vacating judgments prescribed by ch. 17, tit. 28 of Bal. Code, his petition must contain a statement of facts warranting relief under one or more of the causes, in that chapter especially enumerated, for which a court is empowered to vacate a judgment, and that the facts recited in the petition do not warrant the vacation of the judgment for any of the causes mentioned in that chapter. They contend, further, that, if it be conceded that the petition does state facts sufficient to warrant relief for the causes set out in § 4953 of the Code, it cannot avail the respondent, because the remedy for relief under that section is by motion, notice, and affidavit, and cannot be had by the form of procedure followed in the case before us. While, in determining questions of this character, as we said in *Hull v. Vining*, 17 Wash. 352 (49 Pac. 537), the court ought not to indulge in any refined distinctions which might amount to a denial of justice, we think it can fairly be doubted whether the facts recited in the petition and found by the trial court make a case for vacating the judgment within the meaning of any of the causes enumerated in the chapter of the Code above cited. On the other hand, we are clear that he has made a case of mistake and excusable neglect, within the meaning of § 4953. The question, then, is, can relief be granted him under this form of procedure? Owing to the fact that the legislature has expressly provided that the proceedings to obtain the benefit of certain of the causes for

vacating judgments enumerated in § 5153 of ch. 17, tit. 28, of the Code, shall be by petition, this court has felt compelled to hold that this form of remedy for these specially enumerated causes is exclusive, and must be pursued before the court is authorized to grant relief from a judgment for any of such causes. *Whidby Land, etc., Co. v. Nye*, 5 Wash. 301 (31 Pac. 752). We have also held that relief could be had for the causes mentioned in § 4953 upon motion of the party adversely affected by the judgment, supported by affidavit, after notice given in conformity with the statute relating to notice generally. *Spokane & Idaho Lumber Co. v. Stanley, ante*, p. 653. But we have not held that the remedy to obtain the benefit of this section was by motion exclusively. Looking to the face of the section, and the principles governing the practice generally, there would seem to be no conclusive reason why it should be so. The section itself does not prescribe a procedure; and while, because of this fact, the court would usually look to the general rather than to a special procedure for rules governing the practice under it, if a substantial reason appeared for following the special procedure, it ought to be permitted to be controlling. Here, we think, a substantial reason did appear. The respondent conceived that the facts of his case warranted relief from the judgment rendered against him under two distinct causes for which the Code permitted relief to be had from a judgment, one of which required that the application thereunder should be made by petition, while the other permitted the application to be made by motion. If it is to be held that these two causes cannot be joined in one form of procedure, then the applicant was driven to one of three alternatives: He had either to institute two distinct proceedings for relief against the judgment and prosecute them at the

Aug. 1901.] Opinion of the Court—FULLERTON, J.

same time; or he had to institute one, prosecute it to a final determination, and, if he failed of success, institute the other; or he had to make his choice of causes at his peril. It is not in accord with the spirit of the Code that the practice thereunder should be made unnecessarily cumbersome, nor is it in accord with justice that the form of relief should be so restricted as to deny to a litigant any of the rights guaranteed him by the Code; and we feel constrained to hold, therefore, that in an application to vacate a judgment the causes prescribed by §§ 4953 and 5153 may be joined under the form of procedure pointed out by that chapter of the Code of which § 5153 forms a part.

The statute provides (§ 5158) that a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered. In the case before us the trial court made the necessary adjudication; but it is said this could only be done after a trial of the defense upon its merits, and that here there was no such trial. But the statute cannot mean that the court must hear the entire cause, and grant the petition only when it appears that the evidence preponderates in favor of the applicant. The weight and sufficiency of evidence in this form of action are questions for a jury. It is sufficient to determine the question here presented, that the court finds that the facts alleged constitute a defense to the cause of action stated in the complaint, and that there is substantial evidence to support the allegations. These matters are sufficiently shown in the present record.

The order will stand affirmed.

REAVIS, C. J., and DUNBAR, WHITE and ANDERS, JJ., concur.

[No. 3629. Decided April 30, 1901.]

NORTH WESTERN LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY, *et al.*, *Respondents*.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Affirmed.

Sidney Moor Heath, for appellant.

W. H. Abel and *James H. Parker*, for respondents.

PER CURIAM.—Action to recover money paid under protest by appellant upon taxes levied on three steam tugs in Chehalis county—the *Traveler*, *Astoria*, and *Printer*—in the year 1897. The facts relative to the assessment of these three vessels are identical with those appearing in *North Western Lumber Company v. Chehalis County et al.*, *ante*, p. 95, and upon authority of that decision, the judgment is affirmed.

[No. 3838. Decided June 26, 1901.]

JOHN VOGEL, *Respondent*, v. DALLES, PORTLAND & ASTORIA NAVIGATION COMPANY, *Appellant*.

Appeal from Superior Court, Clarke County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

Coover & Stapleton and *Carey & Mays*, for appellant.

W. W. McCredie, for respondent.

PER CURIAM.—This case involves substantially the same principles that were involved in the case of *Sievers v. Dalles, Portland & Astoria Navigation Co.*, 24 Wash., 302 (64 Pac. 539), a petition for rehearing in which case has been overruled since the argument in this case. For the reason stated therein, the judgment in this case is affirmed.

[No. 3913. Decided June 28, 1901.]

LONDON & SAN FRANCISCO BANK, LIMITED, *Appellant*, v. GEORGE
E. FORD *et ux.*, *Respondents*.

Appeal from Superior Court, Kittitas County.—Hon JOHN B.
DAVIDSON, Judge. Affirmed.

Kauffman & Frost, for appellant.

PER CURIAM.—This case depends entirely upon the facts
proven. The facts as found by the court are justified by the
evidence produced and the conclusions of law are properly de-
duced from the facts found. Judgment affirmed.

INDEX

ACCOUNTING. See MORTGAGES, 5; PARTNERSHIP, 1, 2.

ACKNOWLEDGMENTS.

Notaries—Certificate of Acknowledgment—Sufficiency. The failure of a notary to add to his certificate of acknowledgment of a mortgage a statement of his place of residence is not a material defect such as would invalidate the mortgage as against third parties, when his certificate was regular in all other respects, as required by Bal. Code, § 4533, prescribing the form of certificates of acknowledgment, although §249, Id., prescribes that “when the notary public shall sign any instrument officially, he shall, in addition to his name and the words ‘notary public,’ add his place of residence and affix his official seal.” *Griffin v. Catlin*..... 474

ADVERSE POSSESSION.

1. *What Constitutes.* The inclosure of the lands of another within a fence built by the adjoining owner, under the mistaken impression that such fence constituted the boundary line, and the occupancy, cultivation, and improvement of such inclosed lands, for a period beyond the statute of limitations, by planting an orchard, digging a well, and placing a barn and outbuildings thereon, are sufficient to constitute title thereto by adverse possession, when such possession has been open, notorious, exclusive, continuous, and under claim of ownership. —*Bowers v. Ledgerwood*..... 14

2. *Occupation of Railroad Right of Way—Inconsistency With Easement—Estoppel.* Where a railroad company stands by without objection for more than ten years and permits portions of its land grant for right of way to be acquired by settlers under the pre-emption and homestead laws of the United States, who, together with their grantees, plat said land into city lots, make valuable im-

ADVERSE POSSESSION—CONTINUED.

provements thereon, and expend large sums of money for taxes and for street improvements assessed against said lots, the company is estopped from asserting title to those portions of its right of way thus occupied.—

Northern Pacific Ry. Co. v. Ely..... 384

3. *Same—Defense of Public Policy.* Where, through the negligence and laches of a railroad company, the occupancy by others of portions of the right of way granted to it by the government has ripened into title by adverse possession, the company cannot set up the defense that the right of way was granted for public purposes only and that it would be against public policy to permit either its abandonment by the company or the acquisition of adverse rights therein by way of estoppel or of the bar of the statute of limitations.—*Id.*..... 384

See LIMITATION OF ACTIONS, 1; REPLEVIN.

APPEAL.

1. *Abuse of Discretion—Amendment of Complaint.* The fact that the court permits plaintiff to amend her complaint a number of times does not establish in itself an abuse of the discretion given the court in such matters.—*Ross v. Howard* 1
2. *Bond—Objections to Sureties—New Bond—Time of Filing.* Where objection is made to the sufficiency of the sureties upon an appeal bond, and a day is set for their examination, but they fail to appear and justify on said day, the appellant is warranted, under Bal. Code, § 6510, in filing within five days thereafter a new bond with new sureties.—*Wallace v. Oceanic Packing Co.*..... 143
3. *Extension of Time for Filing of Statement—By Whom Grantable.* Under Bal. Code, § 5062, which provides that the time for filing a statement of facts may be extended “by an order of the court or judge wherein or before whom the cause is pending or was tried,” where there are several judges presiding over the superior court of a county, any one of such judges may enter an order extending the time for filing a statement of facts, al-

APPEAL—CONTINUED.

though the cause was tried before another judge of that court.—*Id.*..... 143

4. *Statement of Facts—Service on Attorney.* Under Bal. Code, § 4889, which provides the manner of making service of notices necessary in the conduct of actions, and declares that the services may be personal or by delivery to the party or attorney on whom service is required to be made, or it may be as follows: "If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office," service of a proposed statement of facts on appeal, made upon a clerk, is insufficient when the attorney himself is present in the office.—*Times Printing Co. v. Seattle.*..... 149

5. *When Interlocutory Orders Reviewable.* Alleged error of the court in overruling a motion to dissolve an attachment is reviewable on appeal from the final judgment, although not designated in the notice of appeal pursuant to the provisions of Bal. Code, § 6503, which requires the appellant to designate from what order or judgment the appeal is taken, since the case is governed by § 6500, subd. 1, which provides that, when the appeal is from any final judgment entered in the action, an appeal from such judgment brings up for review any order made in the action, either before or after judgment, in case the record shall show such order sufficiently for the purposes of a review thereof.—*Bingham v. Keylor.* 156

6. *Conclusiveness of Court's Finding on Facts.* Where the statute authorizes the trial court to determine the facts on a motion to discharge a writ of attachment, every presumption must be in favor of the conclusion reached by that court, unless the contrary clearly appears.—*Id.*... 156

7. *Review of Equitable Cause on Insufficient Record—Reversal.* Appellant is entitled to a reversal of a cause of equitable cognizance, and a new trial in the court below, when he seeks such relief instead of a trial *de novo*.

• APPEAL—CONTINUED.

where the record as transmitted to the supreme court clearly shows that the judgment entered was not justified by the evidence as certified by the trial judge, and when the record raises a doubt as to whether the statement of facts contains all of the evidence upon which the cause was tried in the court below.—*Vermont Loan & Trust Co. v. Vaughn*..... 219

8. *Harmless Error—Instructions on Negligence.* An instruction that if defendant's employee wilfully allowed an electric car in his charge to run unimpeded up to the time when a collision was inevitable, then the verdict should be for plaintiff, is not prejudicial error, although there was no allegation or proof of wilful injury, when the complaint was broad enough to admit proof of gross negligence and there was evidence from which it might be inferred, and it appears that the instruction as given was evidently intended to cover gross negligence and that the jury were not misled by the use of the term "wilful."—*Traver v. Spokane Street Ry. Co.*..... 225

9. *Record—Pleadings in Former Action—Judicial Notice.* Where judgment on the pleadings has been rendered upon an answer of former adjudication, which was not traversed, the plaintiff cannot, on appeal, have the pleadings in the former case certified by the clerk to the supreme court, for consideration by that court in passing upon the contention that the causes of action were different, when such pleadings had not been put in evidence in the trial court.—*Bartelt v. Seehorn*..... 261

10. *Harmless Error—Admission of Immaterial Evidence.* Error of the court in admitting evidence is harmless, in an equitable cause which is triable *de novo* on appeal, unless it can be shown that the judgment is founded upon immaterial evidence and findings based thereon, or that appellant has been subjected to onerous and unnecessary costs by reason thereof, and that he has been refused relief by the trial court.—*Ingram v. Golden Tunnel Mining Co.*..... 318

11. *Modification of Judgment—Procedure—Waiver of Informality.* Objection cannot be urged on appeal that an

APPEAL—CONTINUED.

- application for the modification of a judgment was made upon motion and affidavits, where the parties in effect treated the motion and affidavits of plaintiff as a petition for modification and defendant's affidavit as an answer thereto, and testimony was taken by both parties on the facts thus presented, without any objection being raised at the time.—*Koontz v. Koontz*..... 336
12. *Dismissal for Failure to File Brief.* Where an appellant to whom no extension of time has been granted neglects to serve and file his brief in the cause within ninety days after filing his notice of appeal, his appeal will be dismissed upon the motion of an adverse party.—*In re Sullivan's Estate*..... 430
13. *Deposit of Money in Lieu of Bond—Conclusiveness of Clerk's Certificate.* Although an appellant may have deposited a bank check instead of cash with the clerk of the superior court in lieu of an appeal bond, a certificate by the clerk to the effect that the appellant had deposited the required sum in gold coin is conclusive of the fact that money was deposited as required by the statute.—*Id.* 430
14. *Sufficiency of Evidence.* The findings of the trial court will not be disturbed, where the evidence is conflicting, unless clearly contrary to the weight of the evidence.—*Riddell v. Brown*..... 514
15. *Same.* Where the evidence is conflicting, the findings of the trial court will not be disturbed, unless clearly against the weight of the evidence.—*Furth v. Kraft*.... 590
16. *Review of Motion for New Trial—Insufficient Record.* Alleged error of the trial court in overruling a motion for a new trial will not be considered on appeal, where there is no statement of facts in the record.—*Nelson v. Seattle Traction Co.*..... 602
17. *Objections Not Urged Below—Insufficiency of Pleadings.* Objection that the answer filed in an action fails to state a defense thereto cannot be raised for the first time on appeal.—*Wilson v. Aberdeen*..... 614

APPEAL—CONTINUED.

18. *Presumptions in Favor of Judgment.* A judgment denying a writ of mandate upon proofs offered and submitted by the parties will be presumed as warranted by the facts, when neither the evidence nor the findings of fact are in the record, although the affidavit for the writ may make out a *prima facie* case, to which no complete defense, either by demurrer or answer, may have been interposed.—*Id.*..... 614
19. *Findings of Fact—Failure to File—Harmless Error.* The failure of the court to file findings of fact and conclusions of law in cases tried without a jury, as required by Bal. Code, § 5029, is not ground for reversal, when no request for such findings, nbr objection to the judgment for lack thereof, appears in the record.—*Id.*..... 614
20. *Supersedeas Bond—Insufficiency.* A judgment in favor of defendant for costs upon the dismissal of plaintiff's action is a judgment for money, and a supersedeas bond upon appeal therefrom need only be in a sum double the amount of such costs, in addition to the \$200 penalty required in the appeal bond, under Bal. Code, § 6506, which provides that the penalty of an appeal bond shall not be less than \$200, and, in order to effect a stay of proceedings, where the appeal is from a final judgment for the recovery of money, it shall be in a penalty double the amount of the damages and costs recovered in such judgment.—*West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*..... 627
21. *Harmless Error—Premature Hearing.* The action of the court in setting a motion for the vacation of a judgment for hearing upon the third day after service of notice thereof, while the court rules forbid the court from setting causes, except emergency cases, for hearing earlier than ten days after being noted for that purpose, will be presumed harmless error, in the absence of a showing that it resulted in prejudice.—*Spokane & Idaho Lumber Co. v. Stanley*..... 653
22. *Review—Sufficiency of Record.* Alleged errors of the trial court will not be reviewed on appeal, where the questions raised are not sufficiently presented in the record.—*Griffith v. Maxwell*..... 658

APPEAL—CONTINUED.

23. *Judgment by Default—Review on Appeal.* Judgment by default for not answering within the time prescribed by rules of court after the overruling of a demurrer to the complaint will not be disturbed on appeal, when there is nothing in the record showing that defendant was entitled to an extension of time for answering.—*Ferguson v. Hoshi*..... 664

See CERTIORARI; COUNTIES, 1; CRIMINAL LAW, 13, 14; HIGHWAYS, 1; JUDGES, 3; JUDGMENT, 3; PROHIBITION, WRIT OF, 1, 2.

APPROPRIATIONS. See STATES AND STATE OFFICERS, 2.

ARBITRATION AND AWARD.

Finality of Award—Review by Courts. Where parties to a dispute agree to submit their differences to arbitration, under the provisions of the statutes applicable thereto, and, by the terms of their submission of the controversy to arbitration, agree to be bound by its results, the award made by the arbitrator is final, and not reviewable by the courts, in the absence of any showing of misconduct or corruption on his part.—*Skagit County v. Trowbridge*.. 140

ASSAULT. See RAPE.

ASSIGNMENTS. See EVIDENCE, 1; MORTGAGES, 1, 2, 6.

ATTACHMENT. See APPEAL, 5, 6; FRAUDULENT CONVEYANCES; JUDGMENT, 1.

ATTORNEY AND CLIENT.

Lien Upon Papers—Waiver. Under Bal. Code, § 4772, which provides that an attorney has a lien for his compensation upon the papers of his client, which have come into his possession in the course of his professional employment, no right of action is given the attorney to enforce such lien, but he is merely entitled to retain such papers until paid, and where he parts with possession, even that right is waived and relinquished.—*Gottstein v. Harrington*..... 508

See APPEAL, 4; INJUNCTION, 1.

BONDS. See APPEAL, 2, 20; COUNTIES, 5; MUNICIPAL CORPORATIONS, 7.

BROKERS.

Action for Commissions on Sale of Real Estate—Evidence—Subsequent Improvements.—In an action to recover a commission agreed upon between plaintiff and defendant for the sale of the latter's farm, which defendant refused to sell upon the production of a purchaser ready and willing to pay the price, evidence that defendant had improved the farm and altered its condition is inadmissible for the purpose of showing that any price previously fixed thereon was thereby necessarily changed, when the plaintiff had no knowledge of the altered conditions.—*Howley v. Maddocks*.. 297

CERTIORARI.

When Lies—Adequate Remedy by Appeal. Certiorari will not lie to bring up for review the action of the lower court in permitting parties to a condemnation suit for right of way to make use thereof without first making compensation to the owners, since there is an adequate remedy by appeal from the judgment in the condemnation proceedings.—*Parker v. Superior Court of Snohomish County*..... 544

CHATTEL MORTGAGES. See **MORTGAGES**, 6.

COMMUNITY PROPERTY. See **HOMESTEAD**, 1; **INJUNCTION**, 1; **VENDOR AND PURCHASER**, 2.

CONSTITUTIONAL LAW. See **JURY**, 3; **MUNICIPAL CORPORATIONS**, 8, 9; **STATUTES**, 1, 3.

CONTEMPT.

Legality of Commitment. Under Bal. Code, § 5798, subd. 5, which provides that disobedience of any lawful judgment, decree, order or process of the court shall be deemed a contempt of court, and Id., § 5801, which provides that, where a contempt is not committed in the immediate presence and view of the court, "before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court," the court has no authority to punish defendant for contempt in refusing to apply money in his possession towards the satisfaction of a judgment, as ordered by the court in supplemental proceedings, where the fact of such refusal is brought to the attention of

CONTEMPT—CONTINUED.

the court by the return of the sheriff and not by way of an affidavit.—*In re Coulter*..... 526

See HABEAS CORPUS; SCHOOLS AND SCHOOL DISTRICTS.

CONTRACTS.

1. *Contract for Construction of Ditch—Interpretation—Suspension of Work—Recovery of Installments Due.* Under a contract for the construction of an irrigation ditch, thirty miles in length, for which the contractor was to be paid at an agreed rate for excavation and materials, payment to be made monthly to the extent of ninety per cent. of the value of the work done, as estimated by the engineer in charge, "provided that if said contractor completes said work and estimates on the same are returned sooner than the funds from the sale of bonds reaches the treasurer of said district, then whatever estimate would have otherwise been payable . . . shall not be payable until the funds arising from the sale of bonds are in the hands of said treasurer to meet the same," the contractor is not required to complete the work before being entitled to maintain an action for any installment due him, but where, after having earned a monthly installment, he waits a reasonable time for the defendant to sell its bonds and pay him the compensation due, and defendant neglects and refuses to raise moneys from the sale of its bonds, he is warranted in suspending work and bringing an action for the recovery of the *pro tanto* amount due under his contract.—*Dyer v. Middle Kittitas Irrigation District*.. 80
2. *Same—Refusal to Approve Engineer's Estimate—Effect.* A contractor is not debarred from maintaining an action to recover compensation due him under the estimates returned by the engineer in charge of the work, by the fact that such estimates had never been approved by the board of directors of defendant corporation, as the contract required, when it appears that the refusal of the board to act upon the estimates was purely arbitrary.—*Id.*..... 80
3. *Same—Directors—Power to Authorize Suspension of Work.* Under Bal. Code, § 4176, which provides that the board of directors of corporations organized for irrigation purposes shall have power to make and execute

CONTRACTS—CONTINUED.

all necessary contracts, and perform all such acts as shall be necessary to fully carry out the purposes of their charter, such board have power to make an agreement with a contractor that a contract lawfully entered into by them for the construction of an irrigating ditch may be annulled and work thereunder suspended.—*Id.*..... 80

4. *Same—Abandonment—Consideration.* An agreement for the abandonment of a contract needs no new or independent consideration to support it.—*Id.*..... 80

5. *Enforcement of Forfeiture—Performance by Party Asking.* A forfeiture cannot be enforced by one party to a contract, until he shows that he has performed all of the conditions therein to be performed on his part.—*Ingram v. Golden Tunnel Mining Co.*..... 318

See CORPORATIONS, 2, 3; DAMAGES, 1, 2; RECEIVERS, 1, 2; VENDOR AND PURCHASER, 2.

CONVERSION. See TROVER AND CONVERSION.

CORPORATIONS.

1. *Insolvency—Fraudulent Preference of Creditors.* Where, at the time of the execution of a mortgage by a corporation to secure its indebtedness to one of its creditors, the total indebtedness of the corporation did not exceed sixty-six per cent. of a conservative valuation of the corporate assets, and the corporation, at the date of the execution of the mortgage, was doing business, with its affairs in equally as good condition as at any time during its existence, and with every indication of their continuance in the same condition, and it in fact continued to do business for several months thereafter, when it finally became insolvent, such mortgage will not be set aside at the suit of a receiver, on the ground of its being a fraudulent preference by an insolvent corporation.—*Strohl v. Seattle National Bank*..... 28

2. *Rescission of Contract—Authority of President.* Where a corporation has not authorized the rescission of a contract entered into by its president in its behalf, such president has no authority to rescind, even though the contract may have been made by him under a general authority to enter into such contracts without submit-

CORPORATIONS—CONTINUED.

ting the same to the board of directors; and especially is this so where his own private interest would be advanced by the rescission at the expense of his principal.—*Wallace v. Oceanic Packing Co.*..... 143

3. *Actions for Breach of Contract—Authority of Officer—Non-Suit.* One seeking to enforce the liability of a corporation on a contract alleged to have been made by it should not be non-suited for failure to show that the contract was authorized by the corporation, when the evidence shows that it was entered into on behalf of the corporation by its secretary and treasurer, who also at the time occupied the position of general and financial manager of the company, and was entrusted by the board of trustees with the general management of its affairs, since the relations of such officer to the corporation and its course of dealing through him raised a question for the jury to determine whether he was authorized to make the contract in controversy.—*Saunders v. United States Marble Co.*..... 475
4. *Acts of Trustees—When Voidable at Suit of Stockholder.* The action of a majority of a board of trustees is voidable upon the complaint of a stockholder, where the vote of a trustee interested adversely to the corporation was necessary to effect such action; and Bal. Code, § 4257, which provides that “a majority of the whole number of trustees shall form a board for the transaction of business and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act,” is inapplicable in such cases, since the policy of the law forbids a trustee to assume a double function where there are adverse interests to be considered.—*Parsons v. Tacoma Smelting & Refining Co.*.. 492
5. *Acts in Excess of Corporate Powers—Voidable, Although Authorized by Majority of Stockholders.* The articles of incorporation of a corporation constitute a contract entered into by all the stockholders, whose terms cannot be abrogated without the consent of all; hence a lease of the corporate property authorized by a majority vote of the stockholders is voidable at the suit of a non-consenting stockholder, where the articles of incorporation contain no express power to make such lease.—*Id.*..... 492

CORPORATIONS—CONTINUED.

6. *Capital Stock—Ownership by Another Corporation.* One corporation cannot acquire the right to purchase and hold stock in another corporation merely by expressing such power in its articles of incorporation, where such ownership of other corporate stock is not expressly authorized by statute.—*Id.*..... 492

See CONTRACTS, 2, 3; DAMAGES, 2; RECEIVERS, 2; TROVER AND CONVERSION.

COUNTIES.

1. *Claim Against County—Presentation—Waiver of Objection.* The objection that plaintiff failed to present his claim against the county to the board of county commissioners for allowance or rejection, prior to bringing action thereon, as the statute requires, cannot be raised for the first time on appeal, but, when not urged in the trial court, will be presumed to have been waived by the county.—*Rose v. Pierce County*..... 119
2. *Conversion—Sale of Property for Illegal Taxes—Liability of County and Officers.* Where a county treasurer, in an action in his own name and in that of the county to enforce the collection of a tax upon a stock of merchandise, procures the appointment of a receiver, whose actions he directs and controls, both the county and the treasurer are liable for all damages suffered by the defendant therein, by reason of the void and illegal acts of the receiver.—*Id.*..... 119
3. *County Officers—Salaries—Measurement by Population—Federal Census as Evidence.* Under art. 5, § 11, of the constitution, which requires the legislature, by general laws, to regulate the compensation of county officers, in proportion to their duties, and for that purpose to classify the counties by population; and under Laws 1889-90, p. 302, classifying counties, which puts those having between 14,000 and 16,000 population in the thirteenth class; and under Laws 1895, p. 409, which fixes the annual salary of county clerks in counties of the thirteenth class at \$1,500; it is the duty of the county commissioners, in the absence of any law pointing out how population should be ascertained, to determine the fact by proof, and for this purpose the most recent federal census is competent evidence; hence mandamus

COUNTIES—CONTINUED.

- will lie to compel the proper officers to allow the claim of a county clerk for an increase in compensation, where the proof shows that, prior to his term of office, the federal census of 1900 showed that his county had been raised to a class entitling its officers, under the law, to a higher rate of compensation.—*State ex rel. Smith v. Neal*..... 264
4. *Increase of County Indebtedness by Vote—What Constitutes a Three-Fifths Vote—Construction of Constitution.* Under art. 8, § 6 of the constitution, forbidding any county to become indebted in excess of one and one-half per centum of the taxable property in such county, "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," it is not necessary that a proposition for increasing the county's indebtedness submitted at a general election should obtain three-fifths of the highest vote cast at such general election, but no more is required than that such special proposition, in order to carry, receive three-fifths of the votes cast by the voters who specially vote thereon.—*Strain v. Young*..... 578
5. *Fund from Which Bond Interest Payable.* Under the revenue law of 1897 (Laws 1897, p. 136), providing for but two county funds—the "current expense fund" and the "county indebtedness fund," and that "the tax for payment of county current expenses shall be based upon an itemized statement of the estimated county expenses for the ensuing fiscal year," and that "the tax for the payment of county indebtedness shall be based upon the indebtedness of the county," interest falling due upon county bonds issued under Laws 1887-88, p. 12, and Laws 1889-90, p. 37, is properly classed as county indebtedness and payable from the "county indebtedness fund," in the absence of provisions in the acts authorizing such bonds limiting payment to the methods prescribed therein.—*Seymour v. Frost*..... 644

See HIGHWAYS, 1, 2.

COVENANTS.

1. *Action for Breach of Warranty of Title—Pleading—Immaterial Averments.* In an action for the breach of a covenant of title, in a warranty deed, the action

COVENANTS—CONTINUED.

of the court in striking from the complaint, on motion of defendant, the words, "and claimed to own and held itself out as the owner of all the lands to deep water," was not erroneous, when such stricken matter referred to claims made by defendant a year prior to the execution of the deed, since the intention of the parties must be gathered from the deed itself, when there is no ambiguity in its terms.—*West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*..... 627

2. *Same—Liability of Vendor of State Lands.* Where a grantor conveys a tract of land by metes and bounds, with full covenant of warranty of title, he is bound by his covenant as to the whole tract, although a portion of it was openly, plainly, visibly and notoriously tide land, claimed by the state, and from which the grantee was subsequently evicted by the state under claim of paramount title.—*Id.*..... 627

3. *Same—Covenant Against Persons—When Includes State.* A grantor who warrants his title generally against "all persons whatsoever" is liable thereon, although the outstanding paramount title rests in the state instead of in a person.—*Id.*..... 627

4. *Same—Action for Breach—What Constitutes Eviction.* When the paramount title is in the state and the covenant in a deed from a private grantor is ordered by the state to either vacate or to purchase the land, and he accordingly purchases from the state in order to protect improvements made by him while in possession under his grantor's deed, the purchase must be considered such an eviction as to constitute a breach of the covenants of title and for quiet enjoyment.—*Id.*..... 627

5. *Same—Limitations.* The statute of limitations will not begin to run against an action for breach of covenants of warranty of title and for quiet enjoyment until the eviction of the grantee.—*Id.*..... 627

CREDITOR'S BILL.

Fraudulent Conveyances—Adequate Remedy by Law. The remedy by creditor's bill in equity to set aside fraudulent conveyances and subject real estate to sale free from any cloud occasioned by such conveyances is not abolished by the enactment of statutes in aid of execu-

CREDITOR'S BILL—CONTINUED.

tions on judgments at law, but the judgment creditor is entitled in such cases to maintain proceedings on the equitable side of the court, whenever his complaint shows that the relief which the law affords would not be full and adequate.—*Anderson v. Provident Life & Trust Co.*..... 20

CRIMINAL LAW.

1. *Death Warrant—Effect of Amendment of Statute.* Mandamus will lie to compel a superior court to issue a death warrant in accordance with existing law, although before such death warrant can be carried into execution, the existing law will have been superseded by a later enactment which will go into effect in the period intervening between the application for the death warrant and the date fixed for the execution.—*State ex rel. Campbell v. Superior Court*..... 271
2. *Sufficiency of Sentence Inflicting Portion of Penalty Imposed.* Where the statute provides that a person convicted of assault "shall be fined in any sum not exceeding \$500, to which may be added imprisonment in the county jail not exceeding six months," the action of the court in sentencing a person convicted of assault to imprisonment for five months, without first imposing a penalty by fine, is not erroneous, as being beyond the jurisdiction of the court to inflict.—*State v. Dunlap*.... 292
3. *Accomplices—Uncorroborated Testimony.* A verdict of guilty in a criminal prosecution is unwarranted when based upon the evidence of an accomplice who was addicted to the habitual use of opium, and under its influence while testifying, when such evidence is uncorroborated upon any material matters.—*State v. Con-cannon*..... 327
4. *Change of Venue—Amendment of Information.* Under Bal. Code, § 4860, which provides that the court to which a change of venue is taken has the same jurisdiction over the action transferred as if it had been originally commenced therein, an information is amendable by the prosecuting attorney, on leave of the court of another county to which the prosecution had been transferred.—*State v. Lyts*..... 347
5. *Confessions—Statements Made on Preliminary Exam-*

CRIMINAL LAW—CONTINUED.

ination—Admissibility in Evidence. Testimony of the accused, amounting to a voluntary confession, given on his preliminary examination, may be introduced in evidence on his trial, under our statute (Bal. Code, § 6942), which provides that such confession may be given as evidence against the accused, "except when made under the influence of fear produced by threats."—*Id.*..... 347

6. *Separation of Jury—Consent of Accused.* Under Bal. Code, § 6947, which provides that "juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney," it is reversible error for the court to ask defendant, in the presence of the jury, after the trial had proceeded two days without separation, and the case was almost ready to submit, if he would consent to one of the jurors returning home because of the sickness of his child, to which separation defendant was thus compelled to consent, for fear of prejudicing his case in the mind of said juror.—*State v. Parker*..... 405

7. *Misconduct of Jury.* A juror who has testified on his *voir dire* examination that he did not know defendant, and that he could fairly and impartially try the case, free from bias, is guilty of such misconduct as to entitle defendant to a new trial, where, after retirement to the jury room, he makes statements to his fellow-jurors of facts not in evidence against defendant, and asserts his belief in his guilt because he knew him to be a member of a gang of toughs.—*Id.*..... 405

8. *Instructions—Possession of Stolen Property—Presumptions.* In a prosecution for cattle stealing, the refusal of the court, upon request, to instruct the jury as to the presumption, if any, arising from the possession of recently stolen property, was not error, since it was not proper for the court to single out a particular circumstance, and charge the jury what presumption they should give it, but a general charge as to the manner in which circumstantial evidence should be considered would be all that the court could be required to give.—*State v. Harras*..... 416

9. *Same—Words of Similar Import.* In an instruction upon the subject of circumstantial evidence the use by the court in discussing the consistency of the circumstances

CRIMINAL LAW—CONTINUED.

- with the hypothesis of guilt or innocence, of the words "assumption" and "supposition," when plainly intended to be used as synonyms with the word "hypothesis," would not constitute error.—*Id.*..... 416
10. *Same—Reasonable Doubt.* In an instruction upon reasonable doubt, a charge by the court that the jury should decide the question of guilt or innocence "upon the strong probabilities of the case," and "the probabilities need not be so strong as to exclude all possibility of error," would not constitute error, where the court emphasizes the fact that these probabilities must be so strong as to exclude every reasonable doubt.—*Id.*..... 416
11. *Same.* In defining reasonable doubt in a charge to the jury, the court committed no error by instructing that "It should be a doubt for which good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance such as the one you are now considering."—*Id.*..... 416
12. *Same—Corroboration of Accomplices.* The failure of the court to instruct that, in order to justify a conviction, the testimony of an accomplice must be corroborated, was not erroneous, where the question of whether or not the alleged accomplice was such in fact was left to the jury, with a charge that in case they believed he was an accomplice they should consider with greater care whether his story was corroborated by any fact testified to by other witnesses, and that they could not decide the case upon his testimony alone.—*Id.*..... 416
13. *Appealable Order—Refusal to Vacate Judgment After Affirmance.* The action of the lower court in overruling a motion to vacate a final judgment, after its affirmance on appeal to the supreme court, is not an appealable order, under Bal. Code, § 6500, subd. 7, which provides that any party aggrieved may appeal from any final order made after judgment which affects a substantial right, since such second appeal would not raise any questions not passed upon, or which might have been passed upon, in the original appeal.—*State v. Boyce.* 422
14. *Same—Jurisdiction of Lower Court to Modify Judgment After Affirmance.* Where a judgment of conviction has been affirmed on appeal and the lower court

CRIMINAL LAW—CONTINUED.

directed to carry out the judgment inflicting the death penalty, an order of the lower court overruling exceptions taken to its order for the issuance of the death warrant is not appealable.—*Id.*..... 422

See JURY, 2, 3; LARCENY; RAPE; SCHOOLS AND SCHOOL DISTRICTS; STATUTES, 1, 3.

DAMAGES.

1. *Breach of Contract—Liquidated Damages.* Where the owners of adjoining lands, which are protected against overflow from high tides by means of dikes and dams, enter into an agreement whereby one of the owners contributes a sum of money toward the construction of a dam on the condition that certain dikes owned by the others are not to be cut, leveled, or damaged in any way, and in case they should be such sum was to be refunded to him, such sum must be regarded as a stipulation for liquidated damages to which he would be entitled on the breach of the contract.—*Jennings v. McCormick*..... 427

2. *Failure to Deliver Stock—Measure of Damages.* In an action for damages for breach of contract to deliver shares of stock, a verdict based on evidence showing the actual selling price of the stock about the time of plaintiff's demand for its delivery could not be deemed as awarding excessive damages.—*Saunders v. United States Marble Co.*..... 475

See FORCIBLE ENTRY AND DETAINER; JUDGMENT, 19; LANDLORD AND TENANT, 1.

DESCENT AND DISTRIBUTION. See ESTOPPEL; EXECUTORS AND ADMINISTRATORS, 5.

DISCOVERY AND INSPECTION.

Action for Personal Injuries—Physical Examination of Plaintiff. The refusal of the court to allow the physical examination of plaintiff in a personal injury case by an expert is not an abuse of discretion, when such examination is asked for by defendant in the midst of the trial. (*Lane v. Spokane Falls & N. Ry. Co.*, 21 Wash. 119, distinguished.)—*Myrberg v. Baltimore, etc., Refining Co.*..... 364

DISMISSAL AND NON-SUIT. See CORPORATIONS, 3; MASTER AND SERVANT, 1; PRINCIPAL AND AGENT, 3; VENDOR AND PURCHASER, 2; TRIAL, 2, 3, 10.

DISORDERLY CONDUCT.

City Ordinance Against Disturbance of Peace—Construction—Riotous Conduct. A city ordinance prescribing the punishment of "every person who shall on any street, sidewalk, alley, or public place, or in or upon any private house, building or premises, act in a noisy, riotous or disorderly manner," merely uses the term "riotous" in its popular meaning of wanton and bolsterous, and has no allusion to the technical crime of riot.—*State ex rel. Belt v. Kennan*..... 621

DISTURBANCE OF PEACE. See DISORDERLY CONDUCT.

DIVORCE.

Custody of Minor Child—Modification of Decree. A court may modify its decree awarding the custody of an infant child, made in a divorce proceeding, although the time for appeal has expired, when it is shown that new circumstances and conditions have arisen which require a modified decree to meet the new conditions.—*Koontz v. Koontz*..... 336

ELECTIONS. See COUNTIES, 4.

EMINENT DOMAIN. See CERTIORARI; PROHIBITION, WRIT OF, 1.

EQUITY. See CREDITOR'S BILL; TAXATION, 3, 4.

ESTOPPEL.

Grounds—Inconsistent Claims in Judicial Proceedings. Where an intestate died leaving children by two marriages and their mothers surviving him, and where one of the daughters under the first marriage filed a petition by an attorney in fact in the court charged with the distribution of the estate denying both that her sister is a daughter or heir of the deceased, and that their mother is the widow of deceased, and also filed another petition by her attorney alleging that her sister is a legitimate daughter of deceased, and that since the birth of herself and sister her father and mother were duly di-

ESTOPPEL—CONTINUED.

vorced, and asking that the estate be distributed to herself and sister equally; and where a stipulation was filed in the cause agreeing to the distribution of the estate to the widow by the first marriage and to each of the children under the two marriages, such daughter is estopped from questioning the legitimacy of the children by the second marriage, though she may not have been a party to the stipulation, when she was represented in court and raised no objection thereto while the court and all the other parties were acting thereon for a period of nearly two years prior to the distribution by the court in accordance therewith.—*Scott v. Mathews*..... 486

See ADVERSE POSSESSION, 2; MORTGAGES, 1.

EVIDENCE.

1. *Admissibility of Written Assignment.* In an action by plaintiff as the assignee of the claim of one to whom forged county warrants had been sold to recover from defendant the amount paid therefor, which claim, the complaint alleges, had been assigned in writing by plaintiff's assignor to plaintiff for a valuable consideration, the assignment would not be inadmissible in evidence from the fact that it was signed by both the assignor and his wife, when there was no evidence establishing that the wife was a real party in interest.—*Latimer v. Baker*.. 192
2. *Expert Testimony—Motormen.* Upon an issue as to the rate of speed at which an electric car was running at the time of its collision with a buggy, witnesses are competent as experts to testify as to the distances in which a car, going at various rates of speed, could be stopped, when it appears from their examination that they had previously handled electric motor cars, were familiar with their operation, and had either observed the kind of motor in use on the car in question, or had received instructions as to its operation; it being for the jury to determine the weight to be given to such evidence.—*Traver v. Spokane Street Ry. Co*..... 226
3. *Laws of Foreign State—Presumptions.* In the absence of pleading and proof that the laws of a sister state are different from our own, they will be presumed to be the same.—*Gunderson v. Gunderson*.. 459

See APPEAL, 9; BROKERS; CRIMINAL LAW, 3, 5; FISHERIES, 2; MORTGAGES, 4; MUNICIPAL CORPORATIONS, 1.

EVIDENCE—CONTINUED.

TIONS, 1; PARTNERSHIP, 2; PRINCIPAL AND AGENT, 8; TAXATION, 4; TROVER AND CONVERSION.

EXECUTORS AND ADMINISTRATORS.

1. *Right of Administration Upon Decedent's Estate—Principal Creditors.* Bal. Code, § 6141, awarding the right to administer upon a decedent's estate in certain contingencies to one or more of the principal creditors, contemplates only such creditors as were in existence prior to the decedent's death and would not include a creditor for the funeral expenses, since § 6333, Id., specially protects the holder of such a claim by making it the first one payable out of the funds of the estate.—*In re Sullivan's Estate*..... 430
2. *Same.* In a contest among creditors for the administration of an estate valued at \$250,000, where the claims of all the creditors except one were for sums less than \$100, and that one's claim was for \$60,000, there could be but one principal creditor, within the contemplation of Bal. Code, § 6141, awarding administration "to one or more of the principal creditors," if there are no relatives or next of kin.—*Id.*..... 430
3. *Same—Waiver of Right—Power of Court to Appoint Stranger to Estate.* Where one or more of the principal creditors of a decedent's estate waive their right to administration in writing, the court may appoint any person, not a creditor, even if other creditors exist, to administer upon the estate, under Bal. Code, § 6141, which provides that "if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suitable and competent person to administer upon such estate."—*Id.*..... 430
4. *Funeral Expenses—When Charged Upon Decedent's Estate.* Funeral expenses constitute a debt against a decedent, within the contemplation of Laws 1895, p. 197, which provides that "no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent.—*In re Smith's Estate*..... 539

EXECUTORS AND ADMINISTRATORS—CONTINUED.

5. *Same—Statute of Limitations.* Under Laws 1895, p. 197, § 1, which provides that when a person dies seized of lands, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration, etc., and under § 3 of this act, which provides that such real estate shall not be liable for the decedent's debts, unless letters testamentary or of administration be granted within six years after his death, the real estate of a decedent is charged with such debts only in case letters were issued within the period of limitation, and where more than six years have elapsed before the issuance of letters the real estate cannot be charged with said debts.—*Id.*..... 539

See MORTGAGES, 4.

EXEMPTIONS. See HOMESTEAD.

FISHERIES.

1. *Traps—Depth of Water—Construction of Statute.* Laws 1899, p. 194, § 1, which provides that it shall be unlawful for any person to construct, operate, and maintain in any of the waters of the state, "at a greater depth than sixty-five feet at low tide," any pound net or trap for the purpose of catching salmon or other food fishes, was intended by the legislature, in view of all the provisions of the act, to prohibit the construction of such fishing appliances in waters of greater depth at low tide than sixty-five feet.—*Cherry Point Fish Co. v. Nelson* 558
2. *Same—Evidence of Depth—Government Tide Tables.* The tide tables prepared by the United States government for the use of navigators on the waters of Puget Sound are competent evidence for the purpose of finding by their aid the depth of the water at a given time and place, under normal conditions, in order to determine whether a fish trap had been constructed in waters of greater depth than sixty-five feet at low tide, in contravention of the act (Laws 1899, p. 194), relating to the protection and propagation of food fishes.—*Id.*..... 558
3. *Same—Injunction Against Maintenance—Sufficiency of Findings.* A judgment enjoining the maintenance and operation of a fish trap by defendants is supported by a finding of the court that such trap interfered with the

FISHERIES—CONTINUED.

common right of fishery as regulated by the statutes of the state; that it is an infringement upon the location of plaintiff and materially injures and damages the plaintiff, and is, as to it, a nuisance in fact, since such finding is sufficient to show special injury, warranting plaintiff in maintaining injunction against defendants in its own name.—*Id.*..... 558

See TIDE LANDS.

FORCIBLE ENTRY AND DETAINER.

Counterclaim for Damages. In an action of forcible entry and detainer, the defendants cannot, by way of cross complaint, set up a claim for damages by reason of the wrongful issuance of the writ of restitution, but are relegated to an action on the bond given by plaintiff to secure such writ.—*Owens v. Swanton*..... 112

FORFEITURES. See CONTRACTS, 5; INSURANCE, 2; VENDOR AND PURCHASER, 1.

FRAUDULENT CONVEYANCES.

Sufficiency of Evidence. In a trial of a claim of title to goods that had been seized under attachment, the court was warranted in withdrawing the case from the jury and entering judgment for plaintiffs, when the only defense set up by the attaching creditors was that the sale to plaintiffs was fraudulent, and the evidence showed that the sale of the goods had been negotiated on Saturday, an inventory of the goods taken and a bill of sale executed on Sunday, and 60 per cent. of the invoice price of the goods paid by plaintiffs on Monday morning after the delivery of the goods to them; there being nothing in the evidence showing that the price was not reasonable and no evidence of knowledge on the part of plaintiffs of their vendor's fraudulent intent or that he was indebted for anything more than small accounts.—*Berlin v. Van de Vanter* 465

See CORPORATIONS, 1; CREDITOR'S BILL.

GAMING. See LARCENY.

HABEAS CORPUS.

HABEAS CORPUS—CONTINUED.

Review of Commitment for Contempt—Review in Habeas Corpus Proceedings. Although the court in proceeding in a contempt matter without having the facts constituting it shown by affidavit may be merely erroneously exercising jurisdiction, rather than acting without jurisdiction, yet the legality of the order of commitment may be inquired into by writ of habeas corpus, under Bal. Code, § 5826, which restricts courts or judges from inquiring into the legality of any judgment or process whereby the party is in custody for any contempt of court; but provides that an order of commitment as for a contempt upon proceedings to enforce the remedy of a part, shall not be included in the restrictions upon such inquiry. *In re Coulter*..... 526

HIGHWAYS.

1. *Establishment by County Commissioners—Review on Appeal.* The matter of establishing a road being by Laws 1895, p. 82, left wholly to the discretion of the board of county commissioners, and their action in that respect being the exercise of *quasi* legislative authority, the refusal of the board to establish a road upon petition therefor does not present a question which the superior court can review on appeal, since that court cannot take cognizance of cases requiring the exercise of other than purely judicial power. (*Hull v. Stephenson*, 19 Wash. 572, distinguished.)—*Selde v. Lincoln County*..... 198
2. *Board of Commissioners—Powers—Establishment of County Roads.* Under Bal. Code, §§ 3771-3782, prescribing the method of procedure for the establishment of roads by the county commissioners, and providing that a petition therefor must be presented by householders residing in the vicinity of the proposed road setting forth its terminal points, its course and width; that viewers shall be appointed to view, lay out and survey the same as nearly as practicable in accordance with the petition, and make report thereon to the board; that the board must thereupon order a hearing, of which notice must be given to those interested in the lands to be taken, and that the board shall thereafter declare "whether the road shall be established in accordance with the report of the viewers, or otherwise, or at all," the county commissioners have no authority upon the

HIGHWAYS—CONTINUED.

hearing of an adverse report thereon by the viewers, to order the establishment of a road along another route and reaching a different terminal than the one viewed, surveyed and reported upon by the viewers.—*Flint v. Horsley* 648

HOMESTEAD.

1. *Action by Wife Claiming Homestead—Necessary Parties.* Under Bal. Code. § 4826, which provides that when the action concerns the wife's right or claim to the homestead property, she may sue alone, a wife may maintain an action in her own name to restrain the sale of the community realty in which she and her husband claim the right of homestead.—*Ross v. Howard*..... 1
2. *Mortgage by Deed Absolute on Face—Effect on Homestead.* An absolute deed of conveyance of real property does not debar the grantor from setting up a claim of homestead therein, when the deed was intended merely as a mortgage.—*Id.*..... 1
3. *Time of Selection.* Laws 1895, p. 109, which defines a homestead and provides for the manner of selecting the same does not affect prior existing statutes relating to homesteads, which provide that a debtor may select a homestead at any time before sale on execution.—*Id.*.... 1

See PLEADINGS, 1.

HOMICIDE. See CRIMINAL LAW, 14; STATUTES, 3.

HUSBAND AND WIFE. See EVIDENCE, 1; HOMESTEAD, 1;

INJUNCTION, 1; MORTGAGES, 7.

INDIANS.

Indian Lands—Sale by Government—Exemption from Taxation. Under the rule that the state cannot tax lands which belong to the federal government or over which it has retained the right of control, lands on an Indian reservation, including those belonging to the government agency and those which have been assigned in severalty, pursuant to treaty, are exempt from state taxation, where they have been sold and deeded under act of Congress to purchasers from whom deferred pay-

INDIANS—CONTINUED.

ments thereon remain due, and, by the terms of the act, the deeds are conditioned that they should operate as a complete conveyance only upon full payment of the purchase money.—*Page v. Pierce County*..... 6

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 4; RAPE.

INFANTS.

1. *Summons—Sufficiency.* Under Laws 1887-88, p. 24, which provides that civil actions may be commenced by filing a complaint and issuing a summons, and that, if the action be against a minor under the age of fourteen years, such summons shall be served by delivering a copy thereof to such minor personally, and also to his father, mother or guardian, etc., a service upon the mother of the minor defendant, although she was not a party to the action, directed to her as such mother and notifying her to appear and defend the action, in addition to a proper service made upon the minor personally, was sufficient, as a substantial compliance with the provisions of the statute.—*Kalb v. German Savings & Loan Society* 349
2. *Judgment Against Minors—Vacation—Procedure.* Under Bal. Code, § 5153, subd. 8, which provides that a judgment may be modified or vacated for error therein shown by a minor within twelve months after arriving at full age, and under § 5157, Id., which provides that “in such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried,” it is not required that the petitioner shall file his motion or petition in the original case, nor is any statutory form of procedure prescribed by such sections which must be strictly pursued.—*Morrison v. Morrison* 466
3. *Same—Parties.* In an action by a minor within one

INFANTS—CONTINUED.

year after attaining majority to vacate a judgment, a sister affected by the same judgment, but who was past the age when she could maintain the like kind of action, and against whom no relief was sought, is not a necessary party to the action seeking to open up the judgment.—*Id.* 466

4. *Same—Failure to Mention Children in Will—Admissibility of Evidence to Show Testator's Intent.* In an action by a minor within one year after arriving at the age of majority to vacate a judgment awarding all the property of plaintiff's deceased mother to her surviving husband, under a will which failed to mention the children of the testator, the complaint states a cause of action when it alleges that the will made no provision for any of the children, and that oral evidence was received by the trial court for the purpose of showing an intention to omit them, since the admission of such evidence to vary the will constituted error of the trial court.—*Id.* 466

5. *Process—Service Upon Guardian of Minors—Number of Copies Necessary.* Service of one copy of summons upon the father, in an action in which his three minor children were defendants, was sufficient, where a copy was left with each of the minors, since the object of the service is notice, and one copy served on the father would answer that purpose as well as an increased number of copies.—*Id.* 466

See DIVORCE; JUDGMENT, 6.

INJUNCTION.

1. *Restraining Execution Sale of Homestead—Liability of Creditor's Attorney.* In a complaint by a wife to restrain the judgment creditor of her husband and his attorney from selling the community real property upon a judgment for the separate debt of the husband, the complaint states no cause of action against the attorney, when it alleges that he has made various attempts to collect the judgment by attempted levy upon property which he knew was not subject to the judgment, and that, actuated by malicious motives, he had been perniciously active in the matter.—*Ross v. Howard*.... 1

2. *Illegal Exercise of Powers by State Officers—Right of*

INJUNCTION—CONTINUED.

Taxpayer to Restrain. A taxpayer and citizen suing in a private capacity cannot maintain a suit to enjoin a state officer from committing a breach of his public duty, without showing that he will suffer an injury thereby differing in kind from that suffered by the public at large.—*Tacoma v. Bridges*..... 221

3. *Same—Remote Injury.* A complaint in an action by a municipality and one of its citizens to enjoin a state officer does not state facts sufficient to constitute a cause of action when it alleges, in substance, that defendant, in excess of his powers, threatens to lease certain of the public lands of the state, and that the lessees thereof will commit a nuisance on the leased lands which will operate injuriously to the health of the individual plaintiff and to the health of the inhabitants of the municipality, since the threatened injury is too remote to authorize the interference of a court of equity.—*Id.*.. 221

See FISHERIES, 3; MUNICIPAL CORPORATIONS, 3.

INSTRUCTIONS. See APPEAL, 8; CRIMINAL LAW, 8-12; LARCENY, 2; TRIAL, 5-8.

INSURANCE.

1. *Conditions of Policy—Payment of Premiums—Waiver by Agent.* A policy of insurance upon the life of plaintiff's husband was issued by defendant; the premiums thereon were payable to the general agents of the defendant located in the city of the insured's residence, upon receipts countersigned by them, which had printed thereon in bold-face type the words, "The agent has no authority to waive or postpone payments of premiums, or to countersign any receipt, unless the premium is actually paid in cash." Upon several occasions the agents, without knowledge of their principal, had accepted the insured's checks and deferred presenting them for a short period, at his request, but upon one occasion, when the premium was not paid when due, they had required him to make application directly to the company for reinstatement. Held, that the agreement of the agents to extend the time of payment of a premium due was not binding upon the defendant.—*Nixon v. Traveller's Ins. Co.*..... 254
2. *Same—Forfeiture.* The fact that a policy of insurance

INSURANCE—CONTINUED.

contained no provision for forfeiture for non-payment of any installment of premium, but only such a provision for forfeiture upon non-payment of the full annual premium, was immaterial, where the policy gave the insured the option to pay premiums either annually or in quarterly installments, and the insured chose the latter method, thus making it a part of his contract.—*Id.* . . . 254

3. *Policy Issued to Mortgagee—Effect of Alienation by Mortgagor.* Where a policy of fire insurance was issued to a mortgagee, "loss, if any, payable to the mortgagee as interest may appear," and the policy provides that if with the consent of the company an interest under the policy shall exist in favor of a mortgagee, the conditions contained in the policy "shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto," the rights of the mortgagee under the policy would be unaffected by the act of the owner in violating the conditions in the policy against alienation and subsequent insurance, when such conditions were not attached to or written upon that part of the contract in the policy giving the mortgagee an interest thereunder.—*Boyd v. Thuringia Ins. Co.* 447

INTERVENTION. See PARTIES.

INTOXICATING LIQUORS.

Injuries From Sale—Liability of Lessor—Right of Action Against Tenant. Where a lessor of premises has been compelled to pay a judgment for damages against him by reason of the injuries resulting from the sale by his tenant of intoxicating liquors on the leased premises, under Bal. Code, §§ 2945, 2947, which provide that the owner or lessor of premises wherein intoxicating liquors are kept for sale shall be severally and jointly liable with the person selling for injuries to person or property or means of support caused to another by reason thereof; and any owner or lessor of real estate, who shall pay any money on account of such liability, for any act of his tenant, may, in a civil action, recover of the tenant the moneys paid, a lessor who has been compelled to pay a judgment against himself for the act of a tenant has no right of action against his tenant,

INTOXICATING LIQUORS—CONTINUED.

when the latter had not been made a party to the original action fixing the liability of the lessor.—*Burkman v. Jamieson* 606

IRRIGATION. See CONTRACTS, 1-4.

JUDGES.

1. *Rendition of Decree Upon Trial at Chambers.* Under Code 1881, § 2138, which provided that a judge of the district court might, at chambers, try, hear and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury; and that all judgments and decrees rendered by a judge of the district court at chambers should have like force and effect as though rendered at a regular term of the district court, a decree in an action to quiet title cannot be held void from the fact that it recites that the cause came on for hearing before the judge at chambers.—*Kalb v. German Savings & Loan Society*..... 349
2. *Judges Pro Tempore—Jurisdiction in Trial of Causes—Power to Determine Motion for New Trial.* Under Bal. Code, § 4676, which provides that a case may be tried by a judge *pro tempore*, when the parties to the cause have agreed thereto in writing, a judge *pro tempore* may be appointed upon the written stipulation of the parties to hear and determine whatever remains to be done in a case, even after verdict, such as the determination of questions raised by motion for new trial, and the entry of judgment upon the verdict theretofore rendered.—*Nelson v. Seattle Traction Co.*..... 602
3. *Same—When Authorized to Settle Statement of Facts.* A judge *pro tempore* has power to settle the statement of facts in a case, where he was the presiding judge at the time of its trial and has been duly appointed judge *pro tempore* after the expiration of his term, for the purpose of trying whatever remains to be done in the case.—*Id.* 602

See APPEAL, 3; JUDGMENT, 9; TRIAL, 5, 9, 10.

JUDGMENTS.

1. *Attachment—Dissolution of Writ—Res Judicata as to Other Grounds.* Under Bal. Code, § 5359, which author-

JUDGMENTS—CONTINUED.

- izes the issuance of successive writs of attachment, and § 5380, which provides for the amendment of the affidavit for the writ, in case of any defect which can be amended so as to show that a legal cause for the attachment existed at the time it was issued, the dissolution of an attachment on one ground is not *res judicata* when a new or amended affidavit sets up an entirely new ground for the writ.—*Bingham v. Keylor*..... 156
2. *Action for Rent—Res Judicata.* Where a tenant under a lease for one year abandoned the premises at the end of the first month, and, in an action by the landlord for the second month's rent, judgment was rendered in defendant's favor on the ground that the lease was invalid, such judgment is *res judicata* in a subsequent action brought by the landlord at the end of the year for the use and occupation of the premises for the balance of the term of eleven months during which the tenant was alleged to have been in constructive possession.—*Dolan v. Scott* 214
3. *Judgment of Superior Court—Conclusiveness on Appellate Tribunal.* The fact that a judgment in a former action was for an amount which would render it unappealable to the supreme court, would none the less constitute it a bar in the latter court in a subsequent action between the same parties involving the same subject matter.—*Id.* 214
4. *Res Judicata—When Dismissal Operates as Bar.* A judgment dismissing an action for damages after the introduction of plaintiff's testimony, based on the ground of plaintiff's contributory negligence, is a judgment on the merits and not one for failure of proof, and stands as a bar to any subsequent action between the same parties for the same cause of action.—*Bartelt v. Seehorn*.. 261
5. *Collateral Attack.* An action by a minor seeking to have himself decreed a tenant in common of certain real estate, in which he attacks the validity of a prior judgment in an action to quiet title which decreed he had no interest therein, is a collateral attack upon such prior judgment.—*Kalb v. German Savings & Loan Society*.... 349
6. *Same—Admissibility of Evidence.* In a collateral attack upon a judgment against a minor, evidence that no notice of the time or place of trial was given to his guar-

JUDGMENTS—CONTINUED.

- dian *ad litem*, although admissible in a direct attack, is not competent to oust the court of jurisdiction and invalidate its judgment rendered in the prior action.—*Id.* 349
7. *Validity—Presumptions.* The mere fact that a summons was defective in form would not render the judgment in the action void, where the court was one of general jurisdiction, since every fact not negatived by the record must be presumed in support of the decree.—*Id.*..... 349
8. *Default Judgment—Vacation—Discretion of Court.* The action of the trial court in vacating a default judgment is not an abuse of discretion, when done upon a showing that defendant's attorney had erroneously noted the day of service as being one day later than the actual day; that he attempted to serve a demurrer upon plaintiff upon the last day, as he understood it to be from his notation, and was informed that a default had been taken the preceding day; and that while proceeding to the court house to ascertain the condition of the record, he was passed by plaintiff's attorney in a conveyance, who thereby reached the court house before him and in the meantime procured the entry of a default and judgment against him.—*Dalgarno v. Trumbull*..... 362
9. *Orders Made by Court—Power of Correction.* Where a demurrer setting up two grounds of objection to a complaint was sustained by the judge without specifying upon which ground the order was made, it was not error for the judge on the same day, after the entry of his order sustaining the demurrer, to correct his order so as to specify the proper ground upon which his ruling was based, although no showing therefor had been made, other than the calling of his attention to the need of correction.—*Stivyer v. Lawyer*..... 360
10. *Lien—Revival.* Under Code Proc., §§ 462, 463, which provide that the lien of a judgment continues for five years from the date of its rendition, and that proceedings to revive the lien may be instituted within six years from the date of judgment, the judgment lien terminates at the expiration of five years from its date of rendition, and becomes inoperative for any purpose unless revived within the succeeding year, when the lien again begins to operate from the date of revivor.—*Packwood v. Briggs*..... 530

JUDGMENTS—CONTINUED.

11. *Same—Expiration of Lien Pending Execution Sale—Effect.* An execution sale upon a judgment whose lien has expired is void, even if the execution had been issued prior to the expiration of the lien.—*Id.* 530
12. *Invalidity—Remedy for Sale Under Void Judgment.* The remedy of the grantee of a judgment debtor, whose land has been sold under a void judgment against his grantor, is not by bringing proceedings to vacate the judgment under Bal. Code, § 5153 *et seq.*, but is governed by *Id.*, § 5500 *et seq.*, which authorizes actions to recover possession of real estate and to quiet title thereto.—*Krutz v. Isaacs* 566
13. *Vacation—Procedure—When May Be By Motion.* An application under Bal. Code, § 4953, for the vacation of a judgment upon the grounds of mistake, inadvertence, surprise, and excusable neglect is properly made by motion, since the procedure by petition for the vacation of judgments is applicable only to the particular cases set forth in Bal. Code, § 5156, which specially prescribes the procedure to be followed in those cases alone. (*Whidby Land, etc., Co., v. Nye*, 5 Wash. 301, explained.) —*Spokane & Idaho Lumber Co. v. Stanley*..... 653
14. *Same—Notice.* Three days' notice of hearing upon a motion made for the vacation of a judgment upon the grounds afforded by Bal. Code, § 4953, is sufficient, under Bal. Code, § 4886a, which provides that after a party has appeared in an action he shall be entitled to three days' notice of any trial, hearing, motion, application, or proceeding therein, since the twenty days' notice required by Bal. Code, § 5157, upon the filing of a petition to vacate a judgment is confined only to the special proceedings pointed out in the chapter of which it forms a part. (*Chehalis County v. Ellingson*, 21 Wash. 638, overruled.)—*Id.* 653
15. *Same—Procedure—May Be Presented by Motion.* A judgment which has been irregularly obtained may be vacated and set aside by the court on motion therefor, although a remedy by petition is afforded by Bal. Code, § 5156.—*Griffith v. Maxwell* 658
16. *Judgment on Pleadings—Amount of Recovery—Restricted to Admissions in Answer—A judgment upon the*

JUDGMENTS—CONTINUED.

pleadings in an action to recover the price of goods sold to defendant upon a mutual and open account, is properly restricted to the amount admitted in the answer to be due, rather than that claimed by the complaint, although the reply may set up matter tending to show the correctness of the complaint and the error of the answer, since the affirmative averments of the reply are presumed to be denied, and plaintiff could consequently recover on none of the disputed items without proof of its correctness.—*Id.*..... 658

17. *Vacation—Procedure—Joinder of Causes.* The fact that the proper procedure for the vacation of a judgment upon the grounds stated in Bal. Code, § 4953, is by motion, while the procedure prescribed for the vacation of judgment for one of the causes provided in Id. § 5153, is by petition, would not preclude the applicant from presenting by way of petition his demand for relief, based upon a joinder of the causes of action provided for under those two sections of the Code.—*Williams v. Breen* 666

18. *Same—Necessity of Valid Defense—How Determined.* Bal. Code, § 5158, which provides that a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered, does not contemplate a trial upon the merits, but merely that the court shall find that the facts alleged constitute a defense to the cause of action upon which the judgment is founded and that there is substantial evidence in support thereof.—*Id.* 666

19. *Default Judgment—Damages Recoverable.* Upon a judgment by default, without the introduction of proof, plaintiff is entitled merely to nominal damages instead of the amount prayed for in his complaint.—*Ferguson v. Hoshi.*..... 664

See APPEAL, 11, 18, 23; CRIMINAL LAW, 13, 14; DIVORCE; INFANTS, 2-4; MORTGAGES, 7; TAXATION, 5, 6.

JURISDICTION. See HABEAS CORPUS; PROCESS.

JUSTICES OF THE PEACE. See PROHIBITION, WRIT OF, 2.

JURY.

1. *Compensation—Attendance Upon Court.* Under the statute (Bal. Code, § 1609) allowing jurors a certain per diem for each day's attendance on a court of record, jurors are not entitled to compensation for Saturdays, where the court has excused them from Friday evening until Monday morning, for the purpose of hearing motions, although such jurors could not have known prior to Friday evening whether or not they would be called for jury duty the following day, and those jurors living at a distance were unable to reach home and return during the time for which they were excused and were therefore compelled to remain in town even if not on jury duty.—*State ex. rel. Hastie v. Lamping*..... 278
2. *Trial by Jury—Right to—Violation of City Ordinances.* Violation of city ordinances do not fall within the class of misdemeanors against the state, under which the accused is guaranteed the right of trial by jury, from the mere fact that Bal. Code, § 739, subd. 36, provides for the arrest, trial and punishment of all persons charged with violating any of the ordinances of cities of the first class, "but such punishment shall in no case exceed the punishment provided by the laws of the state for misdemeanors," since Laws 1899, p. 135, specifically defining the jurisdiction of the justice of the peace selected as police justice in such cities, provides that he shall have exclusive jurisdiction over all offenses defined by any ordinance of the city, and that in the trials of actions for violations thereof, "no jury shall be allowed."—*State ex rel. Belt v. Kennan* 621
3. *Same—Constitutional Law.* The constitutional right of trial by jury is not impaired by the summary trial and punishment of a person for the violation of a city ordinance against disorderly conduct, since such constitutional guaranty does not extend to petty and minor offenses.—*Id.* 621

See CRIMINAL LAW, 6, 7; TRIAL, 10.

LANDLORD AND TENANT.

1. *Failure of Lessor to Give Possession of Leased Premises—Damages.* Where a lessor fails to give possession of premises leased for the purpose of engaging in a new business, the damages recoverable by the lessee are

LANDLORD AND TENANT—CONTINUED.

measured by the difference between the actual rental value and the rent reserved.—*Engstrom v. Merriam*.... 73

2. *Tenancy at Will—Termination—Notice—Loss of Personal Property—Liability of Tenant.* A tenant under a void lease being merely a tenant at will is privileged to terminate his tenancy at any time without notice, and in such case is not liable for the loss of personal property included in the lease whose loss occurred after his abandonment of the premises, and during the period for which the landlord was attempting to hold him to the terms of the lease.—*Dolan v. Scott*..... 214

3. *Unlawful Detainer—Notice to Quit—Sufficiency.* Under Bal. Code, § 5527, which provides that a tenant is guilty of unlawful detainer, "when he, having leased real property for an indefinite time, with monthly or other periodic rent reserved, continues in possession thereof after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period," notice served just twenty days prior to the end of the month or period, excluding the day of service, is sufficient.—*McGinnis v. Genss*..... 490

4. *Same.* Under Bal. Code, § 5527, authorizing an action of unlawful detainer, where notice to quit has been served upon a tenant "more than twenty days prior" to the end of the month or period for which rent was reserved, it is sufficient to give twenty days' notice prior to the end of the month or period, excluding the day of service.—*Ferguson v. Hoshi* 664

See INTOXICATING LIQUORS; JUDGMENT, 2; PRINCIPAL AND AGENT, 1, 2.

LARCENY.

1. *Grand Larceny—Evidence.* In a prosecution for grand larceny, in which the evidence of an accomplice has been admitted showing that the stolen goods were put in a sack and placed under a table in a room of defendant's house, it is admissible to interrogate witnesses who had been in the room at the time the stolen goods were said to be there whether they had seen either the goods or a sack in the room.—*State v. Concannon* 327

LARCENY—CONTINUED.

2. *Obtaining Money Through Dishonest Gambling Game*
—Instructions. In a prosecution for larceny for obtaining the money of the prosecuting witness by artifice in a game of poker, where it appeared from the evidence that the other players in the game were confederates and that they so manipulated the cards as to give such witness no chance of winning, but he was induced by one of the confederates to bet his money on his hand on the assurance that he held the winning one, all the confederates knowing what such witness had in his hand, a requested instruction was properly refused, where the court was asked to charge that if the jury found the prosecuting witness "engaged in a game of cards, and intended to bet and win or lose his money bet, as money is usually lost or won at cards, and allowed the money to be taken from the table without objection on his part, because he had lost the bet, you will find the defendant not guilty, whatever the character of the game may have been."—*State v. Skilbrick*..... 555

See CRIMINAL LAW, 8.

LIENS. See ATTORNEY AND CLIENT; JUDGMENTS, 10, 11;
 MORTGAGES, 3; MUNICIPAL CORPORATIONS, 10, 11;
 TAXATION, 5, 6.

LIMITATION OF ACTIONS.

1. *Adverse Possession—Occupation of Right of Way—Inconsistency With Easement.* Adverse possession of portions of a railroad right of way, for purposes inconsistent with the company's use of the easement, maintained by the adverse occupant for the statutory period of limitation prescribed against actions for the recovery of real property, will bar an action by the company to recover possession thereof. (*Northern Counties Investment Trust v. Enyard*, 24 Wash. 336, distinguished). *Northern Pacific Railway Co. v. Ely*..... 384
2. *Action for Quieting Title.* Under Bal. Code, §§ 5500, 5501, which provide that in an action for the recovery of the possession of real estate the plaintiff may have judgment quieting or removing a cloud from plaintiff's title, but that such action, where possession has been taken under execution sale, shall be brought within seven years next after possession being taken

LIMITATION OF ACTIONS—CONTINUED.

as aforesaid, and that when the possessor shall acquire title after taking such possession "the limitation shall begin to run from the time of acquiring title," the statute of limitations would not begin to run against plaintiff until his actual ouster and the taking possession of the premises by defendants, where possession was not taken until some time subsequent to the sheriff's sale.—*Krutz*

v. Isaacs 566

3. *Same.* Where an action is brought under Bal. Code, §§ 5500, 5501, both for possession and the quieting of title, the limitation upon such actions of seven years specially provided therein governs instead of Bal. Code, § 4797, subd. 1, which fixes the limitation period at ten years in "actions for the recovery of real property, or for the possession thereof."—*Id.*..... 566

See COVENANTS, 5; EXECUTORS AND ADMINISTRATORS, 5; MUNICIPAL CORPORATIONS, 12.

LOGS AND LOGGING. See REPLEVIN.

MANDAMUS.

1. *When Lies—Adequate Remedy at Law—Contest of Will.* Mandamus will not lie to compel the superior court to hear and determine a motion praying for the vacation of an order admitting a will to probate made within a year after the probate of the will, since the statutes (Bal. Code, §§ 6110, 6112) afford a plain, speedy, and adequate remedy by providing that a will admitted to probate is binding on all persons, if not contested within one year, and by providing a plain procedure for determining all questions affecting its validity, which may be raised by contest within such year.—*State ex rel Stratton v. Tallman* 295
2. *Procedure—Formation of Issues of Fact—Dependence on Mode of Trial.* The fact that Bal. Code, § 5760, authorizes the court to order questions of fact in an application for mandamus to be tried before a jury, would not excuse the applicant from replying or demurring to an answer therein until the cause had been assigned for trial by jury, since the same section vests the court with power, in its discretion, to hear and determine such questions without a jury.—*Wilson v. Aberdeen.*..... 614

See COUNTIES, 3; CRIMINAL LAW, 1.

MASTER AND SERVANT.

1. *Negligence—Action by Employee for Personal Injuries—Non-suit.* Defendant is not entitled to a non-suit in an action against it to recover for personal injuries resulting from its negligence in allowing dynamite to lie for several months near the mouth of its mine tunnel, exposed to heat and rain, thereby rendering its explosive character extra hazardous, when it appears from the evidence that plaintiff had been working for nearly two months in the mine removing dirt and rocks after blasts; that he knew of the existence and proximity of the exposed dynamite, but there was nothing to show that he knew of its extra hazardous condition because of its exposure to the weather, and there was nothing in his duties requiring him to be an expert in the knowledge or use of dynamite; and there was no evidence conclusively establishing plaintiff's contributory negligence; or that the explosion was the result of the unauthorized act of a fellow servant.—*Myrberg v. Baltimore, etc., Refining Co.*..... 364
2. *Injury to Servant—Contributory Negligence.* Where a vessel was moored within two feet of a dock, and no method was provided by the master for reaching the dock from the vessel, other than that afforded by stepping from the pin rail or the mizzen rigging to the dock, a longshoreman who had been working on the vessel for three days and a half, who was injured by being precipitated on a pile between the vessel and the dock, because of the breaking of the ratline in the rigging upon which he had stepped to gain the dock, was not guilty of contributory negligence, because he used that method instead of the gang plank, when it was customary for the master and all the sailors to use the ratlines for stepping ashore, and the gang plank had never been put out except in a couple of instances for the use of ladies.—*McDonald v. Svenson*..... 441

MINES AND MINERALS. See **VENDOR AND PURCHASER**, 1.

MORTGAGES.

1. *Assignment—Illegal Cancellation of Mortgage—Subsequent Incumbrances.* A *bona fide* assignee of a note secured by mortgage was not estopped, by the subsequent act of his assignor in cancelling the mortgage

MORTGAGES—CONTINUED.

- of record, from asserting the validity of such mortgage against a subsequent incumbrancer for value and in good faith, who took a mortgage of the same premises from the same mortgagor, in reliance upon the cancellation of the prior mortgage, and in ignorance of its actual assignment, when it was not requisite under the recording acts in force at the time that the assignment of a mortgage be made a matter of record.—*Fischer v. Woodruff* 67
2. *Same—Rights of Assignee.* Where the *bona fide* purchaser of a note secured by mortgage assigns same after maturity, the assignee is not subject to defenses that could not have been urged against his assignor, merely from the fact that his purchase was made after maturity.—*Id.* 67
3. *Taxes—Payment of Junior Mortgagee—Lien.* A junior mortgagee who pays the taxes on the mortgaged property for the purpose of protecting its lien, and without knowledge of the existence of a prior mortgage thereon, is entitled to have the sum paid for taxes declared a lien superior to that created by the prior mortgage.—*Id.*..... 67
4. *Mortgage Foreclosure—Evidence Admissible Under Issues.* Where the only question at issue is the right of plaintiff to foreclose a mortgage against a decedent's estate, plaintiff cannot predicate error on the ground of the court's refusal to admit in evidence a letter from the executor, showing presentation and allowance of plaintiff's claim; nor upon the refusal to admit in evidence the order directing notice to creditors; nor upon the refusal to admit the last will and testament of deceased, as tending to show that the lands mentioned in the will were charged with the payment of the plaintiff's claim.—*Van Dusen v. Kelleher* 315
5. *Redemption From Mortgagee in Possession—Accounting.* One who occupies the position of a mortgagee in possession of the mortgaged premises is accountable, upon redemption thereof, for nothing more than the actual rents and profits received, and the reasonable value of the use of that part of the premises occupied by him, when there has been no wilful default or gross negligence on his part in the management of the property, less such sums as were necessarily expended by

MORTGAGES—CONTINUED.

him for the preservation and maintenance of the property.—*Krutz v. Gardner*..... 396

6. *Assignment—Notice*. Under Bal. Code, § 4565, which provides that any person to whom any real estate or chattel mortgage is given, or any person to whom such mortgage has been assigned and who has recorded the assignment in the office of the county auditor wherein such mortgage is of record, may satisfy and discharge the same of record, a purchaser is not required to make inquiry beyond the records of the county auditor's office, and where without notice of an outstanding unrecorded assignment he purchases the mortgaged property for a valuable consideration on faith of a satisfaction by the mortgagee on the records, he obtains a clear title thereto.—*Gottstein v. Harrington*..... 508

7. *Mortgage Foreclosures—Trial of Title—Decree Finding Title in Husband—Conclusiveness as to Wife's Interest*. Under the rule that questions of paramount title cannot be tried in suits for foreclosure of mortgages, a wife is not bound by a decree in a foreclosure proceeding which finds that her husband was the sole and separate owner of the property and that she had no interest therein, even though she was made a party to the suit because of having joined in the execution of the note, was personally served, and made defendant therein.—*Oates v. Shuey*..... 597

See HOMESTEAD, 2; INSURANCE, 3; MUNICIPAL CORPORATIONS, 10-12.

MUNICIPAL CORPORATIONS.

1. *Defective Sidewalk—Action for Injuries—Evidence of Other Defects*. In an action to recover for personal injuries caused by the defective condition of a sidewalk, evidence of other defects in the same sidewalk of long standing and in close proximity to the defect which was the actual cause of the injury is admissible for the purpose of showing notice to the city of the general defective condition of the street, and as tending to show notice of the particular defect involved.—*Laurie v. Ballard*..... 127

2. *Same—Negligence—Constructive Notice of Defect—Question for Jury*. The question of whether a city was

MUNICIPAL CORPORATIONS—CONTINUED.

constructively charged with notice of a defect in a sidewalk, whereby plaintiff was injured, was properly submitted to the jury, when it appeared from the evidence that the defect had existed for a period variously estimated by witness at from three to seven days, that the street was a much traveled one by reason of the vicinity of a school building and several churches, and that the walk at the point where the injury occurred was elevated on stringers some ten or twelve inches above the ground, and was used for a crossing for teams, for which purpose there had been constructed and in existence for a long time an approach for a wagon driveway.—*Id.* 127

3. *City Printing—Wrongful Award—Injunction—Sufficiency of Complaint.* In an action of injunction to compel a city to award its public printing to plaintiff and to prohibit its publication in a newspaper to which the city had awarded the contract, the complaint states a cause of action when it alleges that the city called for bids for city printing under the terms of its charter which required the city council to designate as city official newspaper that newspaper whose owner offered the lowest proposals; that plaintiff filed a bid to do the city printing for 21 cents per inch for the first insertion, and 20 cents per inch for each subsequent insertion; that the bid accepted by the city from plaintiff's competitor was for 35 cents per inch for the first insertion, and 30 cents per inch for subsequent insertions, measurement to be by nonpareil type, matter set solid; that plaintiff's bid was rejected on the ground that it was indefinite, but plaintiff alleges it was made in view of a general existing custom that city printing was measured in nonpareil type, matter set solid, and that this fact was well known to the city council before it made its award; that the award to plaintiff's competitor will cost the city about \$2,800 more than if the award should be made to plaintiff; that plaintiff is a taxpayer, and that the city council wantonly, with intent to defraud the plaintiff and all other taxpayers of said city, attempted to award said printing to plaintiff's competitor.—*Times Printing Co. v. Seattle* 149

4. *Street Improvements—Payable From Special Fund—*

MUNICIPAL CORPORATIONS—CONTINUED.

Liability for Failure to Create Fund. Where a contract for the improvement of a street provides that the cost thereof shall be payable out of a special fund arising from an assessment of the property benefited, the mere fact that the amount realized from a valid assessment according to benefits was inadequate to meet the cost of the improvement would not render the city liable for the difference out of its general fund.—*Potter v. Whatcom* 207

5. *Same—Failure to Object Before City Council—Review by Courts.* The question of the inadequacy of an assessment for a street improvement to cover the cost of the improvement cannot be raised in a collateral proceeding to recover upon the warrants issued by the city in payment of the expense of the improvement, since it conflicts with the rule that all questions affecting the assessment proceedings, not going to the jurisdiction of the city to make the assessment, must be taken before the city council pending confirmation by that body, and an appeal taken from its determination, before the courts will inquire into the regularity or sufficiency of the proceedings.—*Id.*..... 207

6. *Laying Water Mains—Assessment According to Benefits.* Under the laws of this state, which authorize cities to make local improvements and pay therefor by assessment upon the property specially benefited, and under Laws 1899, p. 234, which recognizes the laying of a water main to be a local improvement in the same class as the grading of a street, the city of Seattle has power, under its charter passed in conformity to such general laws, to create a local assessment district for the purpose of laying a water main and charge the cost thereof against property owners according to benefits to their real property in such district.—*Smith v. Seattle.* 300

7. *Same—Local Improvement Bonds—Power to Issue for Laying Water Main.* Laws 1899, p. 234, which authorizes the issuance and sale of bonds by cities to pay for local improvements is applicable to the city of Seattle, by way of amendment to the powers conferred by the general incorporation law under which it had been incorporated; and under that act and the provision of the Seattle charter adopted pursuant thereto (Seattle

MUNICIPAL CORPORATIONS—CONTINUED.

- charter, art. 8, § 11, subd. 1) which recognize water mains as in the nature of local improvements, the city of Seattle has power to provide for the payment of the expense of laying water mains by the issuance of local improvement bonus.—*Id.* 300
8. *Same—Constitutional Limit of Indebtedness.* The provision of the state constitution (art. 8, § 6) which authorizes cities to become indebted in excess of the limitation upon general municipal indebtedness, for the purpose of supplying such cities with water, artificial light and sewers, cannot be construed as a prohibition upon the method of payment for water mains other than out of a general fund for that purpose nor as a limitation on the legislative power to vest corporate authorities with power to make local improvements by special assessment.—*Id.* 300
9. *Same—Inapplicable to Local Assessment Districts.* The limitation in art. 8, § 6, of the constitution against cities incurring an indebtedness for water, artificial light, and sewers in excess of the five per cent. additional to the amount allowed for general municipal indebtedness has no application to indebtedness by local assessment districts in the laying of water mains, in which the cost is chargeable against the property benefited.—*Id.* 300
10. *Foreclosure of Assessment Liens—Failure to Make Mortgagee a Party—Right of Redemption.* Where a mortgagee has not been made a party to an action foreclosing a street assessment lien against the mortgaged premises as the statute authorizing such foreclosure requires, his rights as mortgagee are not barred by reason of the sale of the premises under the assessment proceedings, but his right to redeem from the assessment lien continues as though he occupied the position of a junior mortgagee as against the lien holder occupying the position of a senior mortgagee.—*Krutz v. Gardner.* 396
11. *Same.* In such a case, the fact that the mortgagee had instituted foreclosure proceedings and bought in the mortgaged premises at a sheriff's sale under the decree, without making the holder of the assessment lien a party to his action, would not affect such mortgagee's right to redeem from the assessment lien.—*Id.* 396

MUNICIPAL CORPORATIONS—CONTINUED.

12. *Same—Limitation on Right to Redeem.* Since the right of a junior mortgagee to redeem accrues at the same time as his right to foreclose, the right of redemption is governed by the statute of limitations which provides that an action upon a contract in writing, or liability express or implied arising out of a written agreement, may be commenced within six years after the cause of action shall have accrued, and hence a mortgagee who had not been made a party to the foreclosure of a street assessment lien would be entitled to redeem from the sale thereunder at any time within six years after the maturity of his mortgage.—*Id.*..... 396

13. *Defective Walks—Question for Jury.* In an action for personal injuries received from a fall upon a sidewalk, the question of the city's negligence was properly submitted to the jury, where there was evidence tending to show that the sidewalk was full of holes caused by the decay of the materials of which it was constructed and that plaintiff's fall was caused by her stepping into one of these holes, although the evidence showed that on the day preceding the accident a fall of slushy snow occurred, which froze hard during the night, leaving the walk in a very slippery condition, and there was evidence from which it might be inferred that the icy condition of the walk was the cause of the accident.—*Ziegler v. Spokane* 439

See JURY, 2, 3.

NEGLIGENCE.

Pleading—General and Specific Allegations—Proof. Where there is a general allegation of negligence followed by an averment and enumeration of specific acts, proof will not be confined to the acts so specified, unless the complaint clearly indicates that it was the intention of the pleader to limit the charge of negligence to such specific acts.—*Traver v. Spokane Street Ry. Co.*..... 225

See APPEAL, 8; MASTER AND SERVANT, 1, 2; MUNICIPAL CORPORATIONS, 1, 2, 13; STREET RAILROADS; TRIAL, 3-5, 7, 8.

NEW TRIAL.

Grounds—Insufficiency of Evidence. Where the verdict of a jury in an action to recover the purchase price on a sale of goods is against defendant in such a sum as not to conform to the facts under either the plaintiff's or the defendant's theory of the case, the defendant is entitled to a new trial on motion therefor.—*Tilden v. Gordon & Co.* 593

See JUDGE, 2.

NOTARIES. See ACKNOWLEDGMENT.

NUISANCE. See FISHERIES, 3; INJUNCTION, 3.

OFFICE AND OFFICERS.

Assessors—Title to Office—Collateral Attack. The right of an assessor to his office cannot be collaterally attacked in an action to enjoin the collection of taxes levied upon property assessed by him.—*North Western Lumber Co. v. Chehalis County* 95

See COUNTIES, 2, 3.

OYSTERS. See FIDE LANDS.

PARTIES.

Foreclosure of Pledge—Right of Intervention. Under Bal. Code, § 4846, which provides that "any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either party, or an interest against both," the receiver of an insolvent bank is entitled to intervene in an action by the trustee of a pledgee of such insolvent bank, instituted for the purpose of establishing the validity of certain city warrants, which were the subject of the pledge, and which, the receiver claims, had been fraudulently and collusively sold by the pledgee to itself; and the fact that the bank, or its receiver, has another legal remedy for the enforcement of its claims is immaterial, under the terms of said statute.—*Muhlenberg v. Tacoma*..... 36

See INFANTS, 3.

PARTNERSHIP.

PARTNERSHIP—CONTINUED.

1. *Fraud of Partner—Falsifying Accounts—Accounting.* In an action for an accounting brought by one partner against a copartner who has falsified the accounts of the firm and misappropriated funds, the defrauded member of the firm is entitled to a judgment for one-half the sum, with interest thereon, that the court finds the firm has been damaged by reason of the misconduct of the defendant and the misappropriation by him of the funds of the firm, where defendant's services, as well as those of plaintiff, were of appreciable and substantial value to the firm over and above the damages the firm sustained by reason of his misconduct,—*Bingham v. Keylor*..... 156
2. *Same—Destruction of Accounts—Evidence—Amount Misappropriated—Basis of Estimating.* Where one partner falsifies the accounts and spoliates the records of the firm, evidence of the earning capacity of the firm is admissible for the purpose of supplying a basis upon which to estimate the damages of the partner who asks an accounting.—*Id.* 156

PHYSICAL EXAMINATION. See DISCOVERY AND INSPECTION.

PLEADING.

1. *Departure.* The fact that plaintiff, in an amended complaint adds what she calls "a supplementary amendment," stating that at a time subsequent to the commencement of the action plaintiff and her husband had selected a homestead in the premises in controversy and filed notice thereof pursuant to the provisions of the act of March 13, 1895, does not constitute a departure, where the original complaint had set up a claim of homestead, by alleging that the premises were then, and for more than ten years last past had been, the homestead of husband and wife.—*Ross v. Howard*..... 1
2. *Duplicity—Election of Remedies—Action Against Corporation.* Where a plaintiff brings suit upon an express contract alleged to have been made with him by a corporation, the fact that he also alleges, by way of ratification and estoppel, the acts of the corporation in accepting and retaining the benefits flowing from such contract would not render his complaint faulty on the ground of duplicity, and subject to a motion for an elec-

PLEADING—CONTINUED.

tion of remedies, when there are no specific allegations concerning ratification, acquiescence, or estoppel, and nothing in the complaint to indicate that plaintiff was seeking to recover on those grounds.—*Saunders v. United States Marble Co.*..... 475

See APPEAL, 1, 9, 17; JUDGMENTS, 15-17; MUNICIPAL CORPORATIONS, 3; NEGLIGENCE; QUIETING TITLE.

PLEDGES.

1. *Foreclosure—Tender of Indebtedness.* Where a pledgor intervenes in an action brought by the pledgee to enforce collection of the collaterals which were the subject of pledge, tender of payment of the amount due from the pledgor is unnecessary, when it does not seek to regain possession of the pledged property, but merely to have the validity of its title adjudged as against the plaintiff and defendant in the action.—*Muhlenberg v. Tacoma* 36

2. *Same—Laches.* The fact that the receiver of an insolvent pledgor of collaterals which had been fraudulently sold by the pledgee to itself made no move to have the sale declared invalid, until his intervention some two years later in an action brought by the pledgee as absolute owner to enforce payment of the collaterals, would not constitute him guilty of laches, when it appears that the pledgee had filed its claim for the debt with him as receiver and never modified same, that the president of the pledgee bank had admitted to the receiver's attorney a year after the alleged sale that they would be satisfied with their claim and interest, that in all the correspondence between the receiver and pledgee the former always treated the collaterals as still in pledge, and the pledgee had made no opposition thereto nor set up any claim of title adverse to the receiver, until a short time prior to the suit, in which the receiver promptly intervened for the purpose of having the sale set aside and the holder of the collaterals declared a trustee charged with the payment to the receiver of any surplus in the proceeds of the collaterals after the satisfaction of the pledgor's indebtedness to the pledgee.—*Id.* 36

3. *Purchase by Pledgee—When Sale Invalid.* Where the

PLEDGES—CONTINUED.

pledgee of collaterals, for the purpose of acquiring title thereto for its own advantage, and not for the purpose of liquidating the pledgor's indebtedness, procures a sale of the pledged property to itself, knowing that the pledgor had no other means of satisfying its claim, and that the collateral had no market value, but under certain contingencies would be worth twice the amount of the debt it was given to secure, the sale is invalid.—*Id.* 36

See PARTIES.

PRINCIPAL AND AGENT.

1. *Unauthorized Lease by Agent—Ratification.* The acceptance by the owner from a tenant of rental stipulated for in a lease made by an agent having no express authority therefor, does not amount to a ratification of the full terms of the lease, where the tenant was immediately notified of the repudiation of the lease and that he could remain in possession only under a monthly tenancy.—*Owens v. Swanton* 112
2. *Same—Evidence.* The refusal of the court to admit in evidence, in an action of unlawful detainer, a lease purporting to be executed by an agent of plaintiff is proper, where there is no proof of the agent's authority nor of the subsequent ratification by the principal.—*Id.* 112
3. *Action Against Undisclosed Principal—Non-suit.* In an action against an undisclosed principal upon a contract for the sale of land, plaintiff should be non-suited, where the evidence shows the contract was executed in the name of an alleged agent, as if the latter were the owner; that the contract in nowise disclosed the relation of principal and agent; that nothing was shown indicating that plaintiff believed he was dealing with an agent, nor tending to show a mutual mistake in so drawing the contract, nor a ratification by the principals, with full knowledge of the material facts respecting the unauthorized acts of the alleged agent.—*Murphy v. Clarkson* 585

See INSURANCE, 1.

PRINTING. See MUNICIPAL CORPORATIONS, 3.

PROCESS.

Failure to Serve Process—Conclusiveness of Sheriff's Return. In an action for equitable relief against a judgment which had been rendered without the court's having acquired jurisdiction of defendant's person because of a failure to properly serve him with process, the return of the sheriff that he made such service by leaving a copy with a person of suitable age at the residence of defendant is subject to attack upon the question of residence, since a sheriff's return is conclusive only as to matters peculiarly within his own knowledge.—*Krutz v. Isaacs...* 566

See INFANTS, 1, 5; JUDGMENT, 7.

PROHIBITION, WRIT OF.

- 1. *When Lies—Jurisdiction of Trial Court—Unaffected by Premature Appeal.* Prohibition will not lie to restrain the superior court from further proceeding in an action to condemn a stream as a right of way for logging purposes, on the ground of a removal of the cause from the jurisdiction of the trial court by appeal, where the appeal was from an order overruling a demurrer to the petition, although such demurrer raised the question of public use, and Laws 1901, p. 213, provide that "either party may appeal from the order of the court adjudicating or refusing to adjudicate that the contemplated use of the property sought to be appropriated is really a public use," since the ruling was simply upon the demurrer (which was not an appealable order), and was not an adjudication upon the facts, from which latter character of order only would an appeal lie.—*Parker v. Superior Court of Snohomish County.....* 544
- 2. *To Justice of Peace—Other Adequate Remedy.* The action of the superior court in granting a writ of prohibition to prohibit a justice of the peace from further proceeding in the prosecution of a defendant for a misdemeanor because, as viewed by the superior court, the justice was proceeding without jurisdiction and his conclusion would be void, will not be disturbed on appeal to the supreme court therefrom, when it is questionable whether the defendant would have an adequate remedy by appeal from the judgment of the justice.—*State ex rel Belt v. Kennan* 621

PUBLIC LANDS.

1. *Cancellation of Entry—Notice to Transferee of Entryman.* Under the rules of the land department of the federal government, the *ex parte* cancellation of an entry of public land is invalid, where the entryman had transferred his rights therein to another and the government had actual notice of the transfer but failed to give the transferee notice of the proceedings for cancellation.—*Whitney v. Spratt* 62
2. *Timber Lands—Construction of Statute.* Under 20 St. at Large, 89, which provides for the sale of public lands, "valuable chiefly for timber, but unfit for cultivation," a ruling by the commissioner of the general land office that lands which were chiefly valuable for timber at the time of entry, but which could not be cultivated after the removal of the timber, were not purchasable under the act, was erroneous.—*Id.* 62

See INDIANS; TAXATION, 2; TIDE LANDS.

PUBLIC POLICY. See ADVERSE POSSESSION, 3.

QUIETING TITLE.

Pleading. In an action to quiet title a complaint which alleged possession of the premises by plaintiff, that he claimed title in fee thereto, and that defendant claimed an estate or interest therein adverse to him, was sufficient to give the court jurisdiction of the subject matter, under Code 1881, § 551, which provided that any person in possession of real property might maintain a civil action against any person claiming an interest in said real property or any right thereto adverse to him, for the purpose of determining such claim, estate or interest.—*Kalb v. German Savings and Loan Society* 349

See JUDGES, 1; JUDGMENTS, 12; LIMITATION OF ACTIONS, 2, 3.

RAILROADS. See ADVERSE POSSESSION, 2, 3; LIMITATION OF ACTIONS, 1.

RAPE.

Assault with Intent to Rape—Information—Allegation of Present Ability. An information charging defendant with the crime of assault with intent to commit rape

RAPE—CONTINUED.

upon another is not sufficient by reason of failure to allege defendant's present ability to carry his intent into execution.—*State v. Dunlap* 292

RECEIVERS.

1. *Action Against to Enforce Liabilities Incurred Before Appointment.* A contract liability of a partnership, incurred prior to the appointment of a receiver of the firm's business and property, cannot be enforced by action against the receiver alone.—*Flynn v. Furth* 105
2. *Invalid Contracts of Corporation—Ratification by Receiver.* The acceptance by the receiver of a corporation of rents reserved under an invalid lease which had been executed by intruders into the corporate offices, does not amount to a ratification, where the receiver had no knowledge of all the material facts and circumstances surrounding the lease.—*Groveland Imp. Co. v. Farmers' Supply Co.* 344

See PARTIES.

REPLEVIN.

Not Maintainable Against One in Adverse Possession Who Severs Logs From Realty. The owner of lands, who is not in possession thereof, cannot maintain replevin for the recovery of saw logs severed from the land by one in adverse possession thereof under claim of right.—*Clarke v. Clyde* 661

SALES. See NEW TRIAL.

SCHOOLS AND SCHOOL DISTRICTS.

Compulsory Education—Refusal to Place Child in School—Contempt of Court. Under the school law of 1897, as amended in 1899, which provides that it shall be the duty of parents and guardians of children between the ages of eight and fifteen years to send them to school at least three months in each year; that any parent or guardian who, after notification by the county superintendent, refuses or neglects to send such child to school, shall, upon complaint of such superintendent, be summoned before the judge, who shall have power to issue an order com-

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

manding the parents to place the child in school, or appear before him and show cause for refusal so to do; and that any person summoned before a superior judge who fails to give satisfactory cause for refusal to comply with the law relating to school attendance, shall be guilty of a misdemeanor and fined; no authority is vested in the superior judge to adjudge such parent or guardian guilty of contempt for failure to comply with an order to place a child in school, since the only penalty the statute imposes is to declare the offense a misdemeanor punishable by fine.—*State ex rel. Henry v. MacDonald*. . 122

See STATUTES, 1.

SERVICE. See APPEAL, 4.

SET OFF AND COUNTERCLAIM. See FORCIBLE ENTRY AND DETAINER.

SHIPPING. See TAXATION, 1.

STATES AND STATE OFFICERS.

1. *Pan-American Exposition Commission—Board of Women Managers—Duties—Right to Share in Appropriation.* Under Laws 1901, p. 129, § 3, which provides that the expenses incurred by the honorary members of the board of women managers of the Pan-American Exposition, "appointed from this state to attend said exposition, and who will work in conjunction with the commissioners to be appointed in collecting and caring for art in needlework, etc., and other exhibits to be displayed at said Pan-American Exposition," be paid out of the fund appropriated by said act, the commissioners appointed to prepare an exhibit for this state cannot, by dispensing with an exhibit of art in needlework, deprive said honorary members of the right to work in conjunction with the commissioners in regard to "other exhibits," nor of the right to share in the appropriation therefor.—*State ex rel. Barr v. Atkinson*. 283
2. *Same—Expenditure of Appropriation—Vouchers.* Section 3 of the act of March 15, 1901, which provides that the expenses incurred by the two honorary members of the board of women managers of the Pan-American Exposition appointed from this state shall "be paid out of

STATES AND STATE OFFICERS—CONTINUED.

said fund to be hereafter appropriated, and the auditor, is hereby instructed to draw his warrant upon the treasurer for all expenses actually incurred upon the presentation of the proper vouchers therefor, is a complete provision in itself for the payment of such expenses, and the other sections of said act which provide that the appropriation shall be expended for expenses incurred by the commissioners "upon vouchers approved by the commissioners," or "upon the requisition of the state commission," approved by the state auditor, are inapplicable to the expenses of said members of the board of women managers.—*Id.* 283

See INJUNCTION, 2, 3.

STATUTES.

1. *Constitutionality—Penalty Not Embraced in Title of Act.* Under § 19, art. 2, which provides that no bill for an act of the legislature shall embrace more than one subject, which must be expressed in the title, a section in the school law defining a misdemeanor and providing for its punishment is illegally embraced within an act entitled "an act to establish a general and uniform system of public schools in the state of Washington."—*State ex rel. MacDonald v. Henry*..... 122
2. *Construction Prior to Taking Effect.* The courts will not pass upon the operation and effect of legislative enactments prior to their going into effect.—*State ex rel. Campbell v. Superior Court*..... 271
3. *Time of Taking Effect—Death Warrant—Repeal of Amendatory Clause.* The act of March 8, 1901 (Laws of 1901, p. 100) relating to the death warrant and amending §§ 6993, 6995, Bal. Code, relative thereto, not being effective under the constitution (art. 2, § 31) until ninety days after the adjournment of the legislature which enacted it, which would make the date of its going into effect June 12, 1901, never became operative by reason of the passage and approval by the legislature in extraordinary session on June 12, 1901, of the act repealing said amendatory act, with an emergency clause declaring the repeal immediately effective, since a statute which takes effect from and after its passage goes into operation on

STATUTES—CONTINUED.

the day when approved and relates back to the first moment of that day.—*In re Boyce*..... 612

See CRIMINAL LAW, 1.

STREET RAILROADS.

Collision with Vehicle—Right to Use of Streets—Duty to Look and Listen. Failure to look and listen before crossing the track of an electric railway in a public street, where the cars have not exclusive right of way, is not negligence as a matter of law; but the duties of both motorman and driver of a vehicle in the exercise of care to avoid collision are mutual, with the qualification that cars cannot turn from their course, nor can they stop with the same promptness or facilities as ordinary vehicles. *Traver v. Spokane Street Ry. Co.*..... 225

See APPEAL, 8; EVIDENCE, 2; TRIAL, 4, 5, 7, 8.

TAXATION.

1. *Ocean-going Tugs—Where Taxable.* Ocean-going tugs, though registered at a foreign port and owned by a foreign corporation, are taxable under the laws of this state, when their *situs* is actually in this state.—*North Western Lumber Co. v. Chehalis County*..... 95
2. *School Lands—Cancellation of Sale—Rights of State Not Divested by Tax Sale.* Under Laws 1893, p. 335, § 26, which provides that "property held under a contract for the purchase thereof, belonging to the state, county or municipality, and school and other state lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same," only the interest of the contractor for the purchase of state school lands, where the contract of sale has been subsequently canceled for non-payment of installments of purchase price due, can be charged with taxes; and the state's right to the purchase price, or its right to forfeit the contract for non-payment thereof, cannot be divested by a tax sale of such lands (*Washington Iron Works Co. v. King County*, 20 Wash, 150, distinguished).—*State v. Frost*.. 134
3. *Excessive Valuation—Relief in Equity—Fraud.* There is no ground for relief in equity against an excessive

TAXATION—CONTINUED.

valuation of property by the assessor for taxation, where the assessor has exercised an honest judgment, and no fraud or arbitrary or capricious action in making the assessment is shown or can be presumed, and where the property, even if overvalued, is assessed in the same proportion as other like property within the jurisdiction of the assessing officer.—*Templeton v. Pierce County*... 377

4. *Same—Evidence of Fraud—Change by Assessor of Valuation Reported by Deputies.* The mere fact that the assessor revised and adjusted in his office the valuations placed upon property by his deputies is not evidence of fraud, in the absence of a showing that he was not familiar with the value of the property, the presumption, on the contrary, being that he did his duty when he made out and certified the assessment as finally returned.—*Id.* 377

5. *Payment by Judgment Lienor—Tax Liens.* Laws 1897, p 175, § 82, which provides that "any person who has a lien, by mortgage or otherwise, upon any real property upon which the taxes have not been paid, may pay such taxes and the interest, penalty and costs thereon," for which he shall have a lien collectible 'as a part of and 'in the same manner as the amount secured by the original lien," is applicable to holders of general judgment liens as well as to holders of specific liens.—*Packwood v. Briggs* 530

6. *Same—When Equitable Lien Arises Through Payment of Taxes.* Where a judgment creditor in good faith pays the delinquent taxes against his debtor's land, in the belief that he has a lien against the premises, and is protecting himself against a paramount claim, he is entitled to an equitable lien as against a mortgagee for the sums expended for taxes, with interest thereon.—*Id.*... 530

See INDIANS; MORTGAGES, 3; OFFICE AND OFFICERS.

TIDE LANDS.

Oyster Beds—Implied License to Cultivate—Abandonment.

The fact that plaintiffs had planted and cultivated oysters upon public lands for a number of years under an implied license, would give them no right to restrain defendant from going into possession of such oyster bed

TIDE LANDS—CONTINUED.

under deed from the state, when plaintiff's possession and occupation had been abandoned at the time of the sale by the state to defendant.—*Riddell v. Brown*..... 514

See COVENANTS, 2-4.

TRIAL.

1. *Verdict—General Controlled by Special Findings.* Where the special verdict of the jury fixes the various items of plaintiff's damages, both general and special, with the exception of one item of special damages alleged in the complaint, and the aggregate of the various items found in the special verdict, plus the amount of the item alleged in the complaint but omitted from the special verdict, is less than the general verdict, the general verdict must yield to the special, with the addition thereto of the omitted item, under the terms of Bal. Code, § 5022, which provides that when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.—*Engstrom v. Merriam*..... 73
2. *Non-suit — When Grantable — Contradictory Evidence.* Where there is any contradiction in the evidence, it is the province of the jury to determine the facts, and, under such circumstances, a non-suit should be refused. *Latimer v. Baker*..... 192
3. *Same—Action for Negligence.* Before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them. *Traver v. Spokane Street Ry. Co.*..... 225
4. *Question for Jury—Contributory Negligence.* In an action to recover for injuries caused by the collision of a street car with a buggy, which was driven upon the track in an effort to get round a loaded truck, an instruction that the driver of the buggy was not bound to pass around the truck or wagon in front of him on the left rather than the right (which would carry him over the street car track), provided a man of ordinary prudence, under the circumstances as appeared to the plaintiff at the time, might have pursued the course he did, is not faulty as being either a comment on the evi-

TRIAL—CONTINUED.

dence, or as telling the jury that the plaintiff could choose either the safe or unsafe way in passing the track, since it was a question for the jury to determine, under the mutual rights of plaintiff and defendant to the use of the street, whether plaintiff was chargeable with negligence in driving upon the track at the time he did.

—*Id.* 225

5. *Instructions—Judicial Comment on Evidence.* A charge to the jury that plaintiff was not guilty of contributory negligence in failing to drive directly across the track, instead of undertaking to turn and drive along the track, provided an ordinarily careful and prudent person, under the excitement and particular circumstances surrounding the plaintiff at the time, might have adopted the course pursued by him is not objectionable on the ground of being a comment on the evidence.—*Id.*..... 225

6. *Same—Construction as a Whole—Misleading in Part.* An instruction which might be deemed misleading, if taken alone, will not be held prejudicial where it appears that, when construed in connection with the other instructions given, it could not have misled the jury.—*Id.* 225

7. *Same—Relevancy of Evidence.* A requested instruction that if the jury find "that the plaintiff was not thrown out of his buggy by the collision with the car, but was dragged out by holding onto the lines, when if he had not so held on to them he would not have been dragged out, then your verdict must be for the defendant," was properly refused, where the evidence tended to show that the wheel of the buggy caught in the fender of the car; that the car and the horse were pulling the buggy in different directions; that the cross tree broke; and that this was the reason plaintiff was pulled out of his buggy.—*Id.* 225

8. *Same—Voluntarily Incurring Danger to Save Property.* An instruction that plaintiff had no right to attempt to save property, if such attempt would endanger him or his person, and it was his duty to use ordinary care in preserving himself, notwithstanding property might be injured if he abandoned it, was properly refused where the evidence showed that plaintiff was injured, while

TRIAL—CONTINUED.

driving a buggy, as the result of a collision with a street car, which was running at a high rate of speed, but unnoticed by him until he had driven on the track, and, instead of jumping out, he endeavored to save both himself and property by turning the horse and buggy off the track. *Id.* 225

9. *Cross-examination—Interruption by Court.* The interruption by the court of a cross-examination cannot be alleged as error, when there is no showing that the court refused to allow counsel to proceed therewith, or that exception was taken by counsel to the action of the court in that regard.—*Koontz v. Koontz*..... 336

10. *Misconduct of Judge—Comment on Facts When Ruling on Motion for Non-suit.* The action of the court in expressing an opinion on the facts when ruling upon a motion for non-suit, is not error, although made in the presence of the jury, when counsel have not requested the withdrawal of the jury during argument and ruling upon the motion.—*Myrberg v. Baltimore etc., Refining Co.* 364

See APPEAL, 8; CORPORATIONS, 3; MANDAMUS, 2; MASTER AND SERVANT, 1; MUNICIPAL CORPORATIONS, 2, 13; PRINCIPAL AND AGENT, 3; VENDOR AND PURCHASER, 2; WITNESSES, 4.

TROVER AND CONVERSION.

Action for Conversion—Evidence. In an action by a corporation for the conversion of a quantity of hay, where a lease by plaintiff to defendant of the lands upon which the hay was grown was put in evidence by the latter, plaintiff is entitled, on rebuttal, to show that the officers executing the lease had intruded into office and had acted without authority, and that that fact was known to defendant when it accepted the lease.—*Groveland Imp. Co. v. Farmers' Supply Co.*..... 344

See COUNTIES, 2.

TRUSTS. See CORPORATIONS, 4.

UNLAWFUL DETAINER. See LANDLORD AND TENANT, 3, 4; PRINCIPAL AND AGENT, 2.

VENDOR AND PURCHASER.

1. *Forfeiture—Who May Declare—Contract to Convey.*

Where a contract for the sale of a group of mining claims is executed by two of the three owners thereof, agreeing to execute a deed for the whole interest and deposit the same in escrow until the completion of payment of all installments of the purchase price, and placing the purchasers immediately in possession with the right to work the claims, the deposit by the purchasers of the first installment of purchase price, with instructions not to pay same over until a deed executed by all the owners should be placed in escrow with the holder of the money, would not give the two parties who contracted to sell the claims the right to declare a forfeiture of the contract, so far as the same related to their interests in the claims.—*Ingram v. Golden Tunnel Mining Co.*

318

2. *Performance of Contract—Sufficiency of Conveyance—*

Trial—Non-suit. In an action to recover damages for defendant's breach of a contract of maintenance, plaintiff should be non-suited, when his complaint alleges that, by the terms of the contract between them, plaintiff agreed to convey to defendant certain land "by good and sufficient deed," and that "said land was duly conveyed as per said agreement," and the deed offered in evidence showed that the land was presumptively community property, without any joinder by the wife in its conveyance.—*Gunderson v. Gunderson*

459

See COVENANTS, 1-5.

VENUE. See CRIMINAL LAW, 4.

VERDICT. See TRIAL, 1.

WATERS AND WATERCOURSES. See CONTRACTS, 1-3;
DAMAGES, 1; MUNICIPAL CORPORATIONS, 6-9.

WILLS. See INFANTS, 4; MANDAMUS, 1.

WITNESSES.

1. *Examination as to Former Testimony.* Where a witness has been cross-examined as to his testimony in another case, respecting the subject matter of his present exam-

WITNESSES—CONTINUED.

ination, it is not error to allow the party introducing him, on re-direct examination, to interrogate him further in relation thereto and as explanatory thereof.

—*Latimer v. Baker*..... 192

2. *Same*. Objection to the cross-examination of a witness as to his testimony in another case concerning the purchase of forged warrants was properly sustained, where the question related to other warrants than those involved in the present suit, though the dealings in regard to all the warrants had been between the same parties.—*Id.* 192

3. *Scope of Cross-Examination*. In an action upon a promissory note, where there was a distinct issue raised by the pleadings as to whether it had been partially paid by defendant's delivery to plaintiff of a crop of wheat, and where defendant's witness had testified to that effect, cross-examination of the witness directed to the condition of the crop, for the purpose of showing that the quality of the wheat would make such a contract improbable, was proper, although the witness had not testified in chief as to the condition or value of the crop.—*Coey v. Darknell*..... 518

4. *Same—Question for Jury*. In such a case, it is not only competent for plaintiff to show the improbability of the alleged contract owing to the poor condition of the wheat, by cross-examination of defendant's witnesses, but he would be entitled to have the question of such improbability submitted to the jury upon the cross-examination alone, without the introduction of rebuttal evidence.—*Id.* 518

See TRIAL, 9.

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